UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	**CHIEF JUDGE ROYCE C. LAMBERTH**
v.	)	**(MAGISTRATE JUDGE JOHN M. FACCIOLA)**
DANIEL CHOI,	)	**No. 10-739-11**
Defendant.	)	

DEFENDANT LT. DAN CHOI'S
RESPONSE TO GOVERNMENT'S
"PETITION FOR WRIT OF MANDAMUS"

INTRODUCTION

To paraphrase Stephen Sondheim, a funny thing happened on the way to what the U.S. Government thought would be a conviction of Gay-civil-rights leader Lieutenant Dan Choi during its criminal trial of him begun on August 29, 2011. And the term "funny" here is used not as in "ha-ha," but as in "something is rotten in the State of America." What happened was that the U.S. Government literally got caught persecuting—by selective/vindictive prosecution—an innocent citizen simply because he had dared to criticize the President of the United States for discrimination against Gay people.

During Lt. Choi's criminal trial, evidence was exposed indicating that the Government had not only brought a heightened federal charge of disobeying an order against Lt. Choi that the Government knew was baseless to begin with, but had decided to bring such a baseless heightened charge before the allegedly-disobeyed order was even given—all in an effort to stop Lt. Choi from "offending" the White House with his powerfully eloquent, protected speech against discrimination in front of the White House. Furthermore, evidence was exposed during Lt. Choi's criminal trial indicating that the Government had apparently illegally spied on Lt.

Choi and other peaceful and lawful Gay-rights activists, leading up to and beyond when the Government decided to bring a baseless charge against Lt. Choi.

Even more damaging, evidence was exposed during Lt. Choi's criminal trial indicating that the paper trail of this Government persecution of Lt. Choi led—like the Watergate tapes snaked their way back to President Nixon—directly to President Obama himself, who was/is not only personally opposed to Gay equality, but was, as the self-described legacy of Dr. Martin Luther King, Jr., deeply humiliated by being criticized by Lt. Choi and others for enforcing discriminatory laws (like "Don't Ask, Don't Tell") against Gay Americans.

Needless to say, after all of this came out during Lt. Choi's ongoing criminal trial and Lt. Choi promptly mid-trial subpoenaed the Government agencies ostensibly involved (the U.S. Park Police and the U.S. Secret Service) for relevant documents and subpoenaed one of their officials to testify, and U.S. District Court Magistrate Judge John M. Facciola ruled he would allow Lt. Choi to pursue a selective/vindictive-prosecution defense based on the evidence, the Government became apoplectic that its persecution would be fully exposed. Even though Judge Facciola specifically found that the evidence that had been exposed thus far during the trial had made out a *prima facie* case for selective/vindictive prosecution, the Government declared that it wanted to seek mandamus to prevent Judge Facciola from allowing Lt. Choi to pursue the selective/vindictive-prosecution defense. Judge Facciola then continued the trial for 10 days to allow the Government time to file for mandamus.

The Government has now filed its putative "petition"[1] for mandamus in this Court, *within* the existing criminal case against Lt. Choi. However, the Government's "petition" is predictably

[1] "Petition" is in quotes throughout this brief to emphasize, as discussed below, that the Government's submission of that title is entirely a creature of the Government's creation and not

nothing more than a frivolous[2] attempt to prevent complete exposure of its profoundly-undemocratic wrongdoing against Lt. Choi and others in this case. The Government's "petition" is procedurally and substantively flawed, and should be dismissed or denied, for the following reasons.

STATEMENT OF FACTS & PROCEDURAL HISTORY

It is the *Government's* burden to demonstrate that its "petition" should be granted, and thus the *Government's* burden to provide a properly supported (record-cited) "petition" to begin with. The Government does not support, with citations to the record, the majority of its assertions in its "petition's" Preliminary Statement, Statement of Facts, and Procedural History. See "Petition" at 1-5, 6-19. In particular, the Government does not even attach to its "petition" any trial transcripts or relevant portions thereof, or crucial trial exhibits like the Park Police video of Lt. Choi's arrest (Govt. Ex. # 2)—outrageously expecting the Court to "like [a] pig[], hunt[] for truffles buried" in the record, Potter v. District of Columbia, 558 F.3d 542, 553 (D.C. Cir. 2009) (Williams, S.J., concurring), if they are in the record at all which many of the Government's assertions are not. Thus the Government's "petition" fails on that account alone and should be denied. Therefore, in this Response, Lt. Choi merely generally denies the

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of the Rules or law. There is no such thing as a petition for mandamus at the district-court level and within the District Court, *i.e.*, from district-court judge to district-court magistrate judge.

[2] The Government's "petition" is frivolous not only because the Government is obviously not entitled under the law to have its "petition" granted, but because the Government in its "petition" completely violates the ethical and pleading standards for presenting a filing to the Court. For example, as just stated, the Government does not bother citing to the record for many of its assertions. Even worse, the Government makes factual assertions in its "petition" that are directly contradicted by the evidence including that just adduced at trial two weeks ago. The Government also mischaracterizes and/or omits evidence, procedural events, Lt. Choi's actual full defense, cases, and the law—all in a desperate effort to avoid compliance with Judge Facciola's decision which will expose its wrongful conduct against Lt. Choi and others.

Government's Preliminary Statement, Statement of Facts, and Procedural History, and only addresses any specific Government assertion when necessary for his arguments.[3]

However, in order prefatorily to show that the Government's "petition" is entirely suspect to begin with, two false assertions by the Government as to basic facts of the underlying arrest-incident of the case will now be addressed briefly. In the second sentence on page 1 of its "petition," the Government states to this Court that on November 15, 2010, "defendant . . . refused to leave the area in response to three orders given by the United States Park Police . . . ." In fact, as was demonstrated at trial and as was even repeatedly admitted by the Government at trial, the orders which the Government allegedly gave Lt. Choi and which he allegedly disobeyed were for him to leave "the sidewalk"—not the "area." See 11/15/10 Video (Govt. Trial Ex. # 2) (showing orders were to leave the "sidewalk"); U.S. Park Police Lieutenant Robert LaChance (Park Police incident commander on November 15, 2010, who allegedly gave the orders), 8/29/11 a.m. Tr. at p. 74 lines 9-12 (testified his orders to Lt. Choi were: "You must leave the closed portion of the White House sidewalk now. All persons remaining on the closed portion of the White House sidewalk will be arrested."); U.S. Park Police Captain Philip Beck (Park Police watch commander on November 15, 2010), 8/31/11 a.m. Tr. at pp. 26-27 (testified orders were to leave the "sidewalk"). The difference is crucial because, as was demonstrated at trial and as was even repeatedly admitted by the Government at trial, Lt. Choi was not on the sidewalk when the orders were allegedly given, nor when he was arrested, nor any time in-between. See Govt. Ex. # 2; AUSA Angela George to Judge Facciola, 8/29/11 a.m. Tr. at p. 109 lines 15-18 ("Well, 36 [CFR] 7.96, Your Honor, specifically defines the White House sidewalk, and it does not include

[3] One false Government assertion that will be addressed now in "housekeeping" is the Government's assertion, see "Petition" at 9, that "In April 2011, the parties reached a resolution." In fact, Lt. Choi never agreed to nor authorized his counsel to agree to the Government plea offer—either in April or any time else.

the ledge and/or what people refer to as the masonry base."); U.S. Park Police Officer Cameron Easter (participated in the arrest of Lt. Choi on November 15, 2010), 8/29/11 a.m. Tr. at p. 19 (Lt. Choi and the other protestors "got up on the ledge that the White House fence is on"); AUSA George to Lieutenant LaChance, 8/29/11 p.m. Tr. at p. 14 ("Earlier you told the court that you made the decision to arrest the 13 individuals, including Mr. Choi that was standing on the ledge."); Defense Counsel Robert J. Feldman and Lt. LaChance, 8/29/11 p.m. Tr. at 51 lines 21-23 (MR. FELDMAN: When you told him through the bullhorn, "Get off the sidewalk," was he on the sidewalk? LT. LACHANCE: He was on the ledge.), at p. 53 lines 10-12 (MR. FELDMAN: But you told them to get off the sidewalk when he's on the ledge, correct? LT. LACHANCE: Yes Sir. MR. FELDMAN: How can you get off the sidewalk when you're not on the sidewalk? LT. LACHANCE: Point taken.). Lt. Choi simply could not have disobeyed an order that did not apply to him to begin with.

In other words, as the Government has known since it arrested Lt. Choi on November 15, 2010, the Government can simply never prove that Lt. Choi disobeyed the orders[4]—and thus the Government's charge of failure to obey an order was baseless to begin with. This is, not coincidentally, why, in its "petition," the Government carefully but deceptively avoids ever quoting the Park Police's express alleged orders, and arranges its words (particularly in that second sentence) to have the Court *infer* orders which were not actually given but which suggest disobedience on Lt. Choi's part.

Second, in the first and third sentences on page 6 of its "petition," the Government states to this Court that on November 15, 2010, "defendant and twelve other individuals [later arrested with defendant] . . . formed a group on the north side of Lafayette Park" and "walked in pairs

[4] Much less that he disobeyed "lawful" orders.

side by side through Lafayette Park, crossed Pennsylvania Avenue, and continued to walk onto the White House sidewalk." In fact, as the evidence at trial demonstrated, this rendezvous as the Government describes it did not happen. Some of the twelve individuals arrested with Lt. Choi arrived separately to the White House sidewalk from the direction of the Treasury Department building. See Captain James E. Pietrangelo, II, 8/30/11 p.m. Tr. at pp. 7-8 ("we didn't go as one group. We did break up. I don't, I think it was in either two groups or three groups, I don't recall the exact number of groups. I was in one group with several individuals.") ("The other 13 people were—the 13 people who got arrested were in the other groups as well as with my group."), 8/30/11 a.m. Tr. at 29 (After getting off the Metro, my "group continued on to the White House. We approached from the Treasury Department side along Pennsylvania Avenue, and at that point we proceeded towards the White House fence. Where we joined the other individuals participating in the speaking.").

These material Government falsehoods fresh on the very heels of the trial are important because they beg the question: If the Government blatantly misrepresents material facts in seeking relief from this Court, how can—and why should—this Court even hear its arguments to begin with? The Court should reject the Government's "petition" out of hand for these falsehoods.

REASONS WHY THE PETITION SHOULD BE DISMISSED/DENIED

The Government's "petition" should be dismissed or denied for the following reasons.

SUMMARY OF ARGUMENT

The Government's "petition" should be dismissed or denied because the D.C. Circuit, in United States v. Washington, already approved of what the Government claims Judge Facciola

did in this case, and thus there is no grounds for relief to begin with. Moreover, there is no jurisdiction for mandamus to issue in this particular case to begin with, because mandamus is not available *intra*-court—that is, from one judge in a given court (District, Circuit, or Supreme) to another judge in the same court—nor available under the All Writs Act at the *district*-court level.

In any case, the Government's "petition" should be denied, because the elements for mandamus are not satisfied. First, the Government had alternative relief: an appeal to this Court. Second, the Government suffers/ed no harm from Judge Facciola's decision because, among other reasons, the Government had an opportunity pretrial to try to develop a rebuttal case to selective (vindictive)-prosecution and squandered it, and Judge Facciola gave the Government a second opportunity at trial to do so after he decided to let Lt. Choi pursue a selective/vindictive-prosecution defense. Third, the Government had no right to have Judge Facciola preclude Lt. Choi's selective/vindictive-prosecution defense at trial, as such a trial defense was squarely within Judge Facciola's discretion to allow. Judge Facciola had specifically deferred the issue of a selective-prosecution defense to trial, and additionally Lt. Choi did not have sufficient *prima facie* evidence of selective/vindictive prosecution until the Government disclosed certain evidence of it at trial. And the evidence at trial clearly adduced a *prima facie* case of selective/vindictive prosecution—showing that the Government's entire case—even its prosecutor's venomous conduct at trial towards the Defense—has been in persecution of Lt. Choi for daring to criticize President Obama.

Finally, the Government has "dirty hands" and should not be granted mandamus regardless of the elements of mandamus. Besides the fact of the outrageous persecution itself, the Government, in total disrespect for Judge Facciola, neglected preparation of its case literally until the last minute, and then had the gall to blame *Judge Facciola* for its neglect when that

neglect came back to bite it at trial. The Government also withheld material from the Defense that it had a duty to disclose.

ARUMENT

I. The Petition Is Precluded Under United States v. Washington

As will be shown momentarily, the Government's "petition" totally fails under a mandamus analysis. However, the Court need not even go to the labor of such an analysis in order to find the Government's "petition" without merit. The Government's "petition" is precluded by United States v. Washington, 705 F.2d 489, 227 U.S. App. D.C. 184 (D.C. Cir. 1983). In that case, the D.C. Circuit—as best as can be determined from the face of the decision—approved of exactly what the *Government* argues Judge Facciola did in this case: allow a criminal defendant to at trial pursue—after introduction of evidence tending to show selective prosecution—a selective-prosecution defense, including by obtaining immediate discovery—for use at the ongoing trial—of documents and testimony from the Government relevant to the defense. See *id.* at 494-495:

> The trial court permitted discovery after the defendant introduced evidence suggesting a link between United States foreign policy and the Israeli government's efforts to solve problems it believes it has with Black Hebrews already settled in Israel. The trial court directed the government to supply appellant with information demonstrating how many passport frauds were detected since 1975, how many detected frauds were prosecuted and how many frauds detected or prosecuted involved Black Hebrews. The government produced most of the statistical information requested by the trial court, and following three days of testimony on this question, the trial court ultimately determined that appellant had not proved her claim of selective prosecution. In reaching this finding the trial court concluded that no records existed to demonstrate specifically how many Black Hebrews were involved in passport frauds or the disposition of those cases involving Black Hebrews suspected of committing passport fraud. Any conflicts that may have existed in the testimony on the selective prosecution

> claim were correctly resolved by the trial court in the government's favor.
>
> *** Indeed, it appears that the court more than adequately protected appellant's right not to be improperly singled out for prosecution.

Since the D.C. Circuit approved[5] of what the Government argues Judge Facciola did, the Government cannot obtain relief from it.

II. The Petition Fails Under a Mandamus Analysis

Even under a full mandamus analysis, the Government's "petition" fails, for the following reasons.

a. Lack of Jurisdiction for Mandamus

First, respectfully, this Court lacks the jurisdiction to grant the Government's "petition." Administrative mandamus lies from a U.S. District Court to "an officer or employee of the United States" Government,[6] 28 U.S.C. § 1361, and appellate mandamus lies from a U.S. appellate court to an inferior U.S. court,[7] see 28 U.S.C. § 1651; Schlagenhauf v. Holder, 379 U.S. 104, 109-110 (1964); In re Tennant, 359 F.3d 523, 528, 360 U.S. App. D.C. 171 (D.C. Cir. 2004), but no type of mandamus lies from one judge of a U.S. District Court to another judge—even a magistrate judge—of that *same* U.S. District Court. That is because both judges *are* the U.S. District Court—in fact, under 18 U.S.C. § 3401, a magistrate judge is for all intents and

[5] The Government ignores this apparent part of the U.S. v. Washington opinion—in fact citing U.S. v. Washington for the contrary proposition that "Permitting a defendant to present selective or vindictive prosecution as a trial defense to the charged crime is legal error." "Petition" at 22; see, also, *ibid* ("See Washington, 705 F.2d at 495 (rejecting claim that selective prosecution should have been decided by jury and not by trial court).").

[6] *I.e.*, Executive Branch personnel.

[7] In the case of the Supreme Court, also to "persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party."

purposes the supervising district-court judge by extension[8]—and there is no statutory or common-law authority for *schizophrenic* process: for a U.S. District Court to order itself to do something. It is an impossibility. A writ simply contemplates a *separate* superior judicial body exerting control.

Moreover, besides mandamus not being available *intra*-court, mandamus by a *District* court is not permitted under 28 U.S.C. § 1651, the All Writs Act—the statute on which the Government relies for its "petition." The All Writs Act states that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." By law, "The writs of scire facias and mandamus are abolished" in district-court practice. FRCP 81(b).

Indeed, no court has apparently ever held that the All Writs Act applies at the district-court level. The Government cites two cases for such a proposition, but neither case bears the weight that the Government puts on it. In fact, the Government really misrepresents the import of these cases. In Washington Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991), neither the applicability nor the propriety of Section 1651 mandamus at the district-court level was at issue. Washington Post was a D.C. Circuit case heard *on normal appeal* of a magistrate-judge-district-court-judge-affirmed order denying a motion to intervene. On appeal, the D.C. Circuit merely noted in passing that in addition to appealing the magistrate's order to the district-court judge, the plaintiff had sought review at the district-court level by petitioning the district-court judge for mandamus, and had been denied. The D.C. Circuit never reached the mandamus-denial issue. It is not even apparent from the face of the Washington Post decision under what statute the plaintiff sought mandamus from the district court, nor why the district court denied mandamus.

[8] Which is why all appeals of or objections to magistrate-judge decisions go to the supervising district-court judge first. See, *e.g.*, 18 U.S.C. § 3402; FRCrP 58(g)(2); FRCrP 59.

The reason for denial well could have been lack of jurisdiction for mandamus at the district-court level.

In the Government's second case, United States v. Lee, 786 F.2d 951 (9th Cir. 1986), also involving relief sought dually by appeal and petition at the district-court level, the non-issue of mandamus was even more explicit. See *id.* at 956 ("To cover all bases, the government also suggests that this court may assume jurisdiction under the All Writs Act, 28 U.S.C. § 1651, by treating the appeal as a petition for a writ of mandamus. We need not reach that issue.").

Thus, the Government's two isolated instances of *attempted* but unsuccessful petition for mandamus at the district-court level do not a "procedural practice"—as the Government absurdly claims, see "Petition" at 5—make.

Non-original-action mandamus is so utterly non-existent at the district-court level that tellingly the Federal Rules of Civil/Criminal Procedure do not even have rules prescribing a petition procedure, such as what the format of any petition must be. They have rules pertaining to "complaints" and "motions," but not "petitions"—which is not surprising again given that mandamus was expressly abolished there. In contrast, both the Rules for the Courts of Appeal and the Rules for the Supreme Court—to which Courts the All Writs Act has traditionally been applied—do specifically provide for "petitions." See FRAP 21; Supreme Court Rule 17.1.

Thus, in the instant case, the Government—as far as seeking *mandamus* goes—could only—assuming it had already *appealed* to this Court and was denied—petition for mandamus against Judge Facciola's decision mid-trial to allow Lt. Choi to pursue a selective/vindictive-prosecution defense to the *D.C. Circuit*. Indeed, Judge Facciola himself expressly continued the trial under the expectation that the Government would petition to the D.C. Circuit. See The Honorable John M. Facciola, 8/31/11 p.m. Tr. at p. 13 ("This is for the Court of Appeals so it is

none of my business."), at p. 15 ("Do we all agree that in courtesy to the Court of Appeals I should suspend so she can file the Writ . . . ."), at p. 24 ("I will as a courtesy to the Court of Appeals continue this matter for 10 days within which for you seek your writ of mandamus."). Since this Court obviously is not the D.C. Circuit, this Court must dismiss the petition. This Court may not exercise a power—the power to issue a writ of mandamus to itself—which it does not and cannot possess. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994) ("Federal courts['] … limited jurisdiction … is not to be expanded by judicial decree."); United States v. Morgan, 346 U.S. 502, 506 (1954) (power of a federal court to grant a writ must be specifically authorized by Congress); In re Cheney, 406 F.3d 723, 729, 365 U.S. App. D.C. 387 (D.C. Cir. 2005) ("Jurisdiction over actions 'in the nature of mandamus' under § 1361, like jurisdiction over the now-abolished petitions for writs of mandamus, is strictly confined").

b. Lack of The Elements of Mandamus

Second, even if this Court had jurisdiction for mandamus in this particular situation, the Government has not, and cannot, meet the *stringent* standard for that very mandamus. A writ of mandamus "is an extraordinary remedy, to be reserved for extraordinary situations." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). "[M]andamus is 'drastic'; it is available only in 'extraordinary situations'; it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a 'clear and indisputable' right to relief; and even if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary." In re Cheney, 406 F.3d 723, 729, 365 U.S. App. D.C. 387 (D.C. Cir. 2005) (citation omitted). Mandamus does not lie unless there is "no other adequate means" by which the petitioner may attain relief. In re Sealed Case, 151 F.3d 1059, 1063, 331 U.S. App. D.C. 385 (D.C. Cir. 1998). The instant case is not such an extraordinary situation.

1. No Lack of Other Adequate Means of Relief

The Government clearly *had* adequate means other than mandamus to seek relief in this case, although that other means is now foreclosed. The Government could have by September 14, 2011,[9] under FRCrP 58(g)(2),[10] appealed to this Court Judge Facciola's mid-trial decision to allow Lt. Choi to pursue a selective/vindictive-prosecution defense. *Cf.* Cole v. U.S. District Court for the District of Idaho, 366 F.3d 813, 818, 822-823 (9th Cir. 2005) ("It is uncontested that petitioners could have, but did not, move for reconsideration of the magistrate judge's ruling with the district court . . . . *** Were we to ignore this simple and direct route open to petitioners for review of the disqualification order, we would be improperly placing our court, rather than the district court, in the role of supervising the magistrate judge's decisions. Petitioners had a ready remedy with the district court, but did not pursue it. *** That petitioners did not avail themselves of review in the district court strongly counsels against our issuing the writ."); Califano v. Moynahan, 596 F.2d 1320, 1322 (6th Cir. 1979) (to same effect); United States v. Ecker, 923 F.2d 7 (1st Cir. 1991) (to same effect). The Government, it is true, filed a "petition" before September 14, 2011, but a "petition" for mandamus is not an "appeal"—as Washington Post and Lee abundantly demonstrate. Indeed, an appeal and a mandamus-petition each has a different standard than the other, and cannot be treated interchangeably.

Moreover, even assuming that the Government *had* appealed to this Court—which is not the case—the Government then also could have upon final order/judgment of this Court

[9] Fourteen days from August 31, 2011—the date of Judge Facciola's decision to allow Lt. Choi to pursue the selective/vindictive-prosecution defense.

[10] "Either party may appeal an order of a magistrate judge to a district judge within 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party."

normally appealed[11] to the D.C. Circuit—as for example the very plaintiff in Washington Post did, and the Government itself in Lee did. Mandamus is simply not to be used as a substitute for the normal avenues of appeal. See Doe v. Exxon Mobil Corp., 473 F.3d 345, 353, 374 U.S. App. D.C. 205 (D.C. Cir. 2007).

Despite the obvious alternative relief, the Government still tries, by engaging in mental gymnastics, to argue that it qualifies for mandamus. The Government argues that it has no appeal *if*[12] Judge Facciola ultimately acquits Lt. Choi on the grounds of selective/vindictive prosecution. See "Petition" at 25 ("if the magistrate court considers vindictive prosecution as a defense to the charge of failure to obey a lawful order—as it has indicated it will—an acquittal on that ground would preclude the government from exercising its statutory right to appellate review" and "For that reason, there is 'no other adequate means' by which the government may obtain relief from the magistrate's court error, other than mandamus."). But the decision from which the Government itself admits[13] it must now show it has no other means of relief to qualify for mandamus is Judge Facciola's already-made mid-trial decision simply to allow Lt. Choi to pursue a selective/vindictive-prosecution defense—not any potential future decision of Judge Facciola to favorably dispose of the charge in Lt. Choi's favor on that grounds. The decision to allow Lt. Choi to pursue the defense is the operative decision for purposes of mandamus analysis.

[11] Including under the "appealable collateral-order" doctrine.

[12] *If* humans had wings they would be birds, but that does not mean the airline business is going out of business anytime soon.

[13] "Petition" at 18 ("Again seeking clarification, government counsel asked if the defense was going to be allowed to pursue the theory posited by the magistrate court as a theory of defense, and the UMSJ responded 'yes'[.]"; at 5 ("The magistrate's consideration of either selective prosecution or vindictive prosecution as a defense to the charge of failure to obey a lawful order is clear error for which no adequate remedy other than mandamus exists.").

Indeed, the Government *could not* even seek mandamus on any potential ultimate decision of Judge Facciola, because it is just a potential decision. (There is an obvious problem of standing.) Judge Facciola could ultimately rule in the Government's favor on the selective/ vindictive-prosecution defense. All that Judge Facciola has held thus far is that Lt. Choi has made out a *prima facie* case of selective/vindictive prosecution. See The Honorable John M. Facciola, 8/31/11 a.m. Tr. at p. 71 ("The Court hasn't made a ruling yet. It's a prima facie case that's sufficient to convince me that there should be a legitimate inquiry into the decision-making process that led to the conclusion that in November charges would have been brought that were different from the charges that were brought in March and April, both in their nature and in their consequence."). In the event—however unlikely—that the Government successfully rebuts that case during the rest of trial, there will be nothing left for it to seek relief from. And, again, as to the operative decision—the mid-trial decision to let Lt. Choi pursue a selective/vindictive-prosecution defense—the Government certainly *had* an adequate means of relief: *appeal* to this Court, and then to the Circuit Court.

Moreover, it simply is not true that an actual disposition of the charge by Judge Facciola in Lt. Choi's favor on selective/vindictive-prosecution grounds would be an *acquittal* that would bar Government appeal, see Arizona v. Manypenny, 451 U.S. 232, 246 (1981) ("the constitutional ban against double jeopardy [only] bars an appeal by the prosecutor following . . . acquittal."). Since, as the Government itself takes pains to admit, see "Petition" at 20, a selective/vindictive-prosecution is not on the merits of the charge, any disposition by Judge Facciola of the charge based on selective/vindictive prosecution would be a *dismissal*—not an *acquittal*. See United States v. Scott, 437 U.S. 82, 97 (1978) ("For double jeopardy purposes, a dismissal is not an acquittal if the 'ruling of the judge, whatever its label, [does not] actually

represent[] a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged.'" (Internal citation and quotation marks omitted).

And, despite the Government's assertion to the contrary, see "Petition" at 5 ("Although the government has a statutory right to appeal the dismissal of criminal charges under 18 U.S.C. § 3731, the availability of that remedy has been infringed by the USMJ's decision to consider selective and/or vindictive prosecution as a trial defense after jeopardy has attached, rather than as a pretrial challenge to the constitutionality of the prosecution."), the Government would have (had) an appeal from such a dismissal *even though trial had already begun*. Under 18 U.S.C. § 3731, "an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." Double jeopardy does not prohibit further prosecution after successful appeal by the Government of an erroneous legal dismissal during trial. See Unites States v. Scott, *supra*.

Thus, for example, in State of Ohio v. Calhoun, 18 Ohio St. 3d 373 (1985), the Ohio Supreme Court, citing United States v. Scott, found that double jeopardy had *not* attached after the judge mid-trial dismissed the indictment on legal grounds—that the indictment was unconstitutionally vague—and the prosecutor successfully appealed that dismissal. The Ohio Supreme Court stated:

> [T]he record in this case indicates that the trial court's reasoning for terminating the proceedings was not premised upon the insufficiency of the prosecutor's evidence. The trial judge likewise did not determine that appellee was innocent of the underlying count.
>
> Rather, the court made a ruling on a point of law that resulted in the termination of the case, *i.e.*, that the statute underlying the indictment was unconstitutionally vague. Notedly, this is not a case in which the prosecution has sought to use its superior resources to wear the defendant down by submitting the matter to successive tribunals in

> the hopes of securing an eventual conviction. *Scott, supra,* at 87. *** At least in the absence of an acquittal or a termination based on a ruling that the prosecution's case was legally insufficient, no interest protected by the Double Jeopardy Clause precludes a retrial when reversal is predicated on trial error alone. See, generally, *Burks* v. *United States, supra;* cf. *Sanabria* v.. *United States* (1978), 437 U.S. 54. The purpose of the Double Jeopardy Clause is to preserve for the defendant acquittals or favorable factual determinations but not to shield from appellate review erroneous legal conclusions not predicated on any factual determinations.

Id. at 376 -377.

In State v. Lee, 180 Ohio App. 3d 739, 745-747, 2009-Ohio-299 (3rd Appellate Dist. Van Wert Cty. 2009), the Ohio appeals court reached the same conclusion regarding the trial court's erroneous mid-trial ruling that the indictment was defective—the same type of ruling that the Government argues would exist in the instant case[14]:

> Accordingly, the State is correct in its assertion that the indictment was not defective and the trial court should not have dismissed it. However, Lee has argued that, even if the trial court erred in dismissing the aggravated robbery count, this Court should not reverse and remand the case. It is Lee's position that jeopardy attached when the jury was sworn, and, therefore, another prosecution of him for this offense is barred by double jeopardy and remand would be pointless.
>
> . . . the trial court dismissed the indictment midtrial based on an erroneous legal conclusion. No determination of factual guilt or innocence was made. Accordingly, we find that double jeopardy would not bar Lee's retrial on the aggravated robbery count, and remand is appropriate.

The Government simply had other means of relief, and thus mandamus is inappropriate.

2. Lack of Harm

There simply was/is/will be no irreparable harm, or even any legally-cognizable harm, to the Government, justifying departure from the normal course of appeal, from the mere mid-trial

[14] The Government argues that selective prosecution is a defect in the information/indictment. The D.C. Circuit has never held so.

decision of Judge Facciola to allow Lt. Choi to pursue a selective/vindictive-prosecution defense. See Banks v. Office of the Senate Sergeant-at-Arms, 471 F.3d 1341, 1350, 1348, 374 U.S. App. D.C. 93 (D.C. Cir. 2006) (mandamus denied because the district court's decision that the defendant had no sovereign immunity from discovery sanctions did not cause "irreparable injury" sufficient to short-circuit the normal appeal process). Judge Facciola's decision merely requires the Government to provide discovery of material relevant to selective/vindictive prosecution, *subject* to any privilege which the Government raises *and* Lt. Choi cannot then legally overcome. As the Government's own "petition" indicates, Judge Facciola—after indicating he would allow Lt. Choi to pursue the defense—specifically asked the Government "what, if any, privileges you intend to assert[?]". "Petition" at 17 (quoting 8/31/11 a.m. Tr. at p. 8). As the Government's own "petition" also indicates, Judge Facciola at that time also indicated that he would allow the Government discovery to try to rebut the *prima facie* case. See "Petition" at 18 (quoting 8/31/11 p.m. Tr. at 5) ("I, therefore, will permit both sides to elicit evidence as to the difference in his treatment on those three occasions.").

Indeed, the Government was/is free to try to rebut the selective/vindictive prosecution if it so desired/s. Simply because the Government *cannot* rebut the defense—because the Government is full-on guilty of persecuting Lt. Choi—is not a type of harm cognizable under mandamus jurisprudence. In fact, the Government *waived* any objection it had to selective/vindictive prosecution being raised at trial or mid-trial, by admittedly repeatedly engaging in preemptive questioning of its own witnesses on their motive in arresting and charging Lt. Choi. See, *e.g.*, AUSA George and The Honorable John M. Facciola during direct of U.S. Park Police Officer Jerome Stoudamire, 8/29/11 p.m. Tr. at p. 130 (MS. GEORGE: "The Court has decided to take the [Government's] motions [in limine against a selective-prosecution

defense at trial] under advisement, so the Government is asking questions. THE COURT: Ms. George, for the last time, you were not obliged to anticipate any defense."); see, also, 8/31/11 a.m. Tr. at 58-59, 70 (one of previous times that AUSA George had asked a preemptive selective-prosecution question, of U.S. Park Police Cpt. Philip Beck). The Government may not "have its cake and eat it too."

Moreover, the Government *cannot* claim irreparable harm, in that the *Government* brought—and insists on maintaining, see 11/31/11 p.m. Tr. at 8, this federal charge against Lt. Choi. The Government cannot cry *substantive* foul simply because Judge Facciola allowed Lt. Choi to exercise his constitutional right to defend himself from the Government's charge.

Knowing that it does not have a leg to stand on regarding this additional mandamus-issue (alleged harm), the Government again resorts to gymnastics to make its case—concocting imaginary harms out of thin air. The Government asserts as its main harm the alleged lack of an appeal from an acquittal on selective/vindictive-prosecution grounds—the same alleged lack of appeal which it used as a "lack of other adequate means," as discussed above.[15] Since this assertion failed the first time, it fails the second time now as well.

The Government also asserts that "by allowing the defendant to elicit evidence that he claims supports a defense of selective or vindictive prosecution, the magistrate court has severely hampered the government's ability to rebut these claims." "Petition" at 25. Specifically, the Government argues that lack of pretrial "notice of the claim" of selective/vindictive prosecution "has made it difficult for the United States to ascertain what witnesses or other evidence . . . it may need to gather and present to rebut the defendant's vague claims." *Id.* at 25-26. The Government also claims harm because allegedly the "'prima facie' case described by the

[15] You know the Government is "in trouble" making its case when it starts conflating mandamus elements or having mandamus arguments do "double duty."

magistrate court does not appear to fall within the scope of the vindictive–prosecution doctrine." *Id.* at 26. The Government also claims harm from allegedly being "in the position of defending against a moving target, created by the defense and the magistrate court positing new theories as the case proceeded." *Id.* Finally, the Government alleges that an acquittal of Lt. Choi by Judge Facciola on selective/vindictive-prosecution grounds would "cause irreparable damage to the reputation of the United States Attorney's Office, as it would directly attack the very integrity of the institution." *Id*. All four of these asserted harms are without merit if not frivolous.

As to the Government's second asserted harm, there simply can be no harm to the Government simply because the Government *asserts* that the evidence does not support a selective/vindictive-prosecution finding in this case. Even if the Government *correctly* asserts—which it does not—that the evidence does not support a (*prima facie*) selective/vindictive-prosecution finding, such a correct assertion—or the attendant erroneous finding—would not be a harm. It might *cause* a harm which would have to be identified by the Government, but it would not be a harm in and of itself. It would simply be the "error" part of the mandamus analysis—not the "harm" part.[16]

As to the Government's third asserted harm, the Government is merely restating its first asserted harm to fill out its "harm" argument.[17] That the Government allegedly is improperly being suddenly exposed to defenses at trial is the same thing as allegedly improperly not being given notice pretrial of those defenses. (Alleged) "surprise" *is* (alleged) "lack of prior notice." They are different time aspects of the same alleged harm. Moreover, Lt. Choi's selective/vindictive-prosecution claim is simply not as the Government claims "vague." Lt. Choi stated it clearly. See, *e.g.*, Lt. Dan Choi, 8/30/11 p.m. Tr. *passim,* and at p. 63 (testified that

[16] The Government is again caught "bootstrapping" to beef up its defective "petition."
[17] Yet further "bootstrapping."

Government charged his two previous arrests after chaining himself to the White House fence in March and April 2010 as municipal traffic-violations, and then ultimately dropped the charges), at pp. 37-44 (testified how his prominence as a Gay-civil-rights activist increased after the first two arrests and the dropped charges), at pp. 86-87 ("I think that when our experience shows very clearly that Captain Pietrangelo and myself, Lieutenant Choi, were arrested in both March and in April 2010, we were not before a federal court. We did not face you. We did not face a wired plea deal. We did not face six months in prison. We did not face a $5,000 fine. In fact, because we pled not guilty, the D.C. Municipal Court, where I believe this court case belongs, although it is here and I'm happy to be here, I think that based on personal experience, no, I would not even say the regulations could tell me that I belong here. I would say that the charges, as they were dropped, would be dropped again in November. And any rational human being will realize that if you've done something twice, you have the audacity to do something twice and you don't get punished, there must be a reason why you didn't get punished. And I don't know what that reason was, but a rational human being can deduce that the charges being dropped after a plea of not guilty, unless we pled guilty, it wouldn't be unlawful. So, it is not unlawful to do what we did and I don't know why I'm here right now."), at pp. 92-93 (testified how November 15, 2010 protest was strident whereas March and April ones were stoic), at p. 78 (testified that November 15, 2010 protest was "uninhibited, robust and wide open"), at p. 76 (explaining how November 15, 2010 protest was different) ("And when we had more people join us the next time, it was, in fact, not a carbon copy, but the corollary to the Greensboro lunch counter sit-ins at the Woolworth department store."); Govt. Ex. # 2 (showing strident speech of Lt. Choi directed at President Obama, and showing military-veteran protestors now with civilian protestors, in contrast to first two protests); see, also, Cpt. Pietrangelo, 8/30/11 a.m. Tr. at pp. 84-85 (testified

that by third protest Lt. Choi had an MLK, Jr. stature—including from his prior arrests—among Gay activists that gave him the gravitas to inspire increasingly more protestors; that Lt. Choi was the leader of the third protest), at p. 35 (testified that third protest was strident and speaking directly to President Obama).

And Judge Facciola—who found that Lt. Choi had stated the selective/vindictive-prosecution claim clearly—re-stated it clearly for the Government. See The Honorable John M. Facciola, 8/31/11 p.m. Tr at p. 5 ("The issue presented by the testimony of the defendant yesterday in my view creates a prima facie case for the proposition that the difference in the manner in which he was prosecuted for his behavior in November as opposed to his behavior in March and April would permit the inference that that difference was a function of the nature of his speech or what he said. It would then follow that the difference in treatment would (a) violate the due process clause because it is vindictive; and (b) independently constitute a violation of the First Amendment because it is predicated on his speech."), at p. 6 ("the defendant has so testified. The defendant said you treated me differently as a function of what I said. That is, when I said X, Y and Z and behaved myself in a certain way, you treated me one way. When, in November, I did just about the same thing–that is a question of dispute, but anyway prima facie—he said, when I did the same thing, you treated me differently. The motivation for the difference in treatment had to do with what I said. First, you violated my rights under the due process clause because you treated me differently without a legitimate justification that would stand analysis under the due process clause which, as far as the federal government goes, since the decision in Bolling versus Sharp includes equal protection. So, the second thing he is saying is that your prosecution of me in November was vindictive. It was different. for you to do it. I submit, he says, I submit that the real reason is, by then, you were offended by the nature. And

there is no rational reason of what I was saying, by my speech. Therefore, by prosecuting me in a different way, you punish me for exercising my First Amendment right. Therefore, that is also a second violation of the Constitution of the United States."), at p. 19 ("The defendant's position is: I said something in March, I said something in April and I said something in November. The reason I was treated in November differently from the March and April is, by November, I began to offend the United States by what I was saying to the point that they treated me differently; and therefore, my rights under the First Amendment and the Fifth Amendment were violated.").

As to the Government's fourth asserted harm, the Government is stating a principle so utterly contrary to American jurisprudence that the Government's "petition" should be rejected on that basis alone. That the United States Attorney's Office would suffer a loss in reputation for having *persecuted* Lt. Choi is not a recognized harm in our democracy but a recognized consequence *of* our democracy. When in a democracy government officials are found to have engaged in wrongdoing, they are properly held to account, including by public condemnation.

That just leaves the Government's first asserted harm—that it has been denied an opportunity to obtain evidence in rebuttal of a selective/vindictive-prosecution defense—and this too is thoroughly specious. First of all, the Government's argument incorrectly presumes that there *is* such rebuttal evidence to be obtained—there isn't, because the Government indisputably persecuted Lt. Choi. Second, the Government already had plenty of opportunity to investigate selective/vindictive prosecution in this case. At Lt. Choi's arraignment on March 18, 2011, the Government first had clear notice that selective prosecution was at issue in the case as a defense. At that arraignment, after Judge Facciola noted the unusually heightened federal charge and cited Shuttlesworth v. Birmingham (a watershed selective-prosecution case), Lt. Choi's then-lead-counsel, Mark Goldstone, indicated that Shuttlesworth applied and that the Government was

treating Lt. Choi and his fellow arrestees differently from normal practice including in Lt. Choi's previous arrests. See 3/18/11 Tr. *passim* and at pp. 9-19, 28. Critically, Mark Goldstone has for years regularly represented White House protestors before D.C. courts, and would certainly be able to recognize the difference.

The Government then had confirmation, on August 24, 2011, and August 25, 2011, respectively, of the selective-prosecution defense. The Government itself admits that during an August 24, 2011 phone call, Lt. Choi's current-lead-counsel, Robert J. Feldman, specifically told AUSA Angela George that the "defendant would be claiming that the government selectively prosecuted him because of his sexual orientation and his Anti-Obama perspective." "Petition" at 11. The Government also admits that during an August 25, 2011 phone-conference between Mr. Feldman, AUSA George, and Judge Facciola, Mr. Feldman asked Judge Facciola to take judicial notice of photographs of the Osama bin Laden-death rally in front of the White House that Mr. Feldman had indicated went to selective-prosecution, and Judge Facciola did so take notice.[18]

Indeed, the Government admits that during the August 25, 2011 phone-conference, Judge Facciola himself told the Government that selective prosecution remained on the table for trial as an issue. See "Petition" at 12 (partially quoting 8/25/11 Tr. at 10-11) ("Later during the status hearing, when the government returned to the selective-prosecution issue, inquiring whether the parties would litigate it, the USMJ stated 'I will hear, at the conclusion of the case, any legal arguments anyone wishes to make; one of which I take it will be that in prosecuting Mr. Choi but not prosecuting these demonstrators [depicted in the photographs], the government is engaging in selective prosecution in violation of the Fifth Amendment.'").

[18] Just so it clear, the copy of the photographs that the Government states, see "Petition" at 11 fn 9, AUSA George received from Judge Facciola's law clerk, were in fact provided by the Defense to the clerk *for* delivery to AUSA Angela George. And Mr. Feldman appeared by phone during the conference because he resides in New York and was there at the time.

The Government thus had an initial five months and one week from March 18, 2011, to August 25, 2011, to do an investigation of selective prosecution and try to marshal a rebuttal. The Government had an additional four days from August 25, 2011, to August 28, 2011, to do so as well. Nor could the Government claim that even four days was insufficient, inasmuch as it developed its own case-in-chief in less than that amount of time. The Government did not bother finishing preparing its case-in-chief until Saturday, August 27, 2011—two days before trial—after it had made its last-ditch and unsuccessful plea offer to Lt. Choi on Friday, August 26, 2011 (as admitted by the Government, see "Petition" at 12). This last-minute preparation is demonstrated by the fact that AUSA George told the Defense that it could pick up Jencks and other discovery material from George's office at 1 p.m. on Saturday, August 27, 2011, and when a member of the Defense was present at George's office at that time, George's office told that member that it was still working on gathering material, and ultimately it did not turn over material until 2:30 p.m. This last-minute effort is also consistent with AUSA George's own statements at least to Defense Counsel and to the Magistrate, as early as the status hearing on June 14, 2011, that George was too busy to prepare for trial in this case. Yet, come trial, the Government—after only two days of preparation—was present with numerous witnesses, prepared lines of direct and cross examination, and even poster-boards with blown-up photographs. See 8/29-31/11 Trs., including Government Exhibit lists. Likewise, the Government could have in the four days after the August 25, 2011 phone-conference obtained witnesses and evidence in supposed rebuttal of a selective-prosecution defense.

The truth is not that the Government did not have an opportunity pretrial to prepare a supposed rebuttal of the selective-prosecution defense for trial, but that it deliberately failed to use that opportunity, because to do so would have been to gather evidence of its own persecution

of Lt. Choi, or to have to face a First/Fifth Amendment challenge in a misdemeanor case, *cf.* United States v. Meyer, 810 F.2d 1242, 1247, 258 U.S. App. D.C. 263 (D.C. Cir. 1987), *aff'd en banc sub nom.*, Bartlett v. Bowen, 824 F.2d 1240 (1987), *cert. denied sub nom.*, United States v. Meyer, 485 U.S. 940 (1988) ("Finally, we take into consideration the government's motivation to act vindictively in this case. *** But the prosecutor in this case confronted something other than routine invocations or procedural rights on the part of individual defendants. In this case, a large group of defendants threatened to go to trial on what the government considered 'petty offenses.' Many of these defendants had indicated their intention to proceed *pro se*. Many had determined to raise first amendment claims during the course of the trial. The government had a strong incentive to try to keep clear of this courtroom morass: it wished to avoid the annoyance and expense of prosecuting these minor cases at a potentially drawn-out trial. The Supreme Court previously had recognized that the government's interest in discouraging unexpected and burdensome assertions of legal rights may rise to a level that supports use of a presumption of vindictiveness.").

Indeed, Judge Facciola himself during trial—precisely when the Government complained about his decision to let Lt. Choi pursue a selective/vindictive-prosecution defense—pointedly commented on the Government's own pretrial lack of diligence regarding the selective-prosecution defense. See "Petition" at 18 (quoting The Honorable John M. Facciola, 8/31/11 Tr. at 6-7) ("During the August 25, 2011 phone conference the government "could have at that point asked me, because selective prosecution was raised, to continue the proceeding so that issue could be addressed. But we all went forward.").

The third reason why the Government cannot claim as a harm the lack of opportunity to "develop" a supposed rebuttal is that Judge Facciola—precisely after deciding to allow Lt. Choi

to pursue a selective/vindictive-prosecution defense—indisputably gave the Government another opportunity to do discovery on the selective (vindictive)-prosecution issue—indeed, the *same* opportunity as Lt. Choi to do discovery on the issue. See "Petition" at 18 (quoting The Honorable John M. Facciola, 8/31/11 Transcript at 2-3) ("I, therefore, will permit both sides to elicit evidence as to the difference in his treatment on those three occasions."); see, also, The Honorable John M. Facciola, 8/29/11 p.m. Tr. at p. 130 ("if he does raise a defense and you in fairness have not had a fair opportunity to speak to the factual issues presented, I will permit you to do so."). Indeed, the Government actually had/has an advantage over Lt. Choi in its new opportunity, because most of the evidence is already in the Government's peculiar possession and knowledge. For example, Lt. Choi did not know of the existence of the pre-protest communications between federal officials to charge him with a federal crime—*e.g.*, the Myers memo, the LaChance conversation, *etc*.—until after the Government witnesses had testified about them at trial. Critically, the Government never disclosed them in discovery to Lt. Choi.

Thus, the Government simply suffered no irreparable harm from Judge Facciola's decision, and mandamus is inappropriate.

3. No Clear and Indisputable Right to Relief

The Government has no clear and indisputable right to relief in this case. Mandamus will only issue "to compel the performance of a clear nondiscretionary duty." Pittston Coal Group v. Sebben, 488 U.S. 105, 121 (1988) (internal quotation marks omitted). "The requirement of a clear duty is inimical to a discretionary determination that is vested in the district court." In re DRC, Inc., 358 Fed.Appx. 193, 194 (D.C. Cir. 2009). "[W]here there is discretion . . . even though its conclusion be disputable, it is impregnable to mandamus." United States ex rel. Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549, 555 (1919). And, again, "[e]ven though

hardship may result [from a lower court's discretionary decision], [in the absence of irreparable harm] extraordinary writs are not substitutes for appeal." United States v. Feeney, 641 F.2d 821, 825 (10th Cir. 1981). Judge Facciola had no clear nondiscretionary duty to preclude Lt. Choi from pursuing a selective/vindictive-prosecution defense at trial or mid-trial, especially after certain evidence of such defense was exposed *for the first time* at trial. At the very *least*, it was within Judge Facciola's discretion to allow Lt. Choi to pursue such a defense at trial or mid-trial. At the very most, Judge Facciola had a clear nondiscretionary *duty* to *allow* Lt. Choi to pursue such a defense at trial or mid-trial as a constitutional right.

Again, in United States v. Washington, 705 F.2d 489, 494-495, 227 U.S. App. D.C. 184 (D.C. Cir. 1983), the D.C. Circuit apparently approved of—as an exercise of discretion—exactly what Judge Facciola did in this case: allowing a criminal defendant to at trial or mid-trial pursue—after introduction of evidence tending to show selective (vindictive) prosecution—a selective (vindictive)-prosecution defense, including by obtaining immediate discovery—for use at the ongoing trial—of documents and testimony from the Government relevant to the defense.

Moreover, generally, a "magistrate . . . permissibl[y] exercise[s] . . . discretionary control over the mode and order of interrogating witnesses and presenting evidence" including during trial. United States v. Ferguson, 778 F.2d 1017, 1020 (4th Cir. 1985) (internal quotation marks omitted); see, also, FRE 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, ..."). This magistrate discretion derives from the fact that the supervising "district court [itself] enjoys broad discretion regarding the manner in which a trial shall proceed." United States v. Ashton, 555 F.3d 1015, 1021, 384 U.S. App. D.C. 368 (D.C. Cir. 2009).

Because a magistrate judge thus has discretion over a case including its trial, a magistrate judge may do anything during the case including at trial which is not otherwise prohibited by law or jurisprudence. There is no legal or jurisprudential prohibition on allowing a criminal defendant to pursue a selective/vindictive-prosecution defense, or even allowing a criminal defendant to do so at trial or mid-trial. Indeed, just the opposite. Selective/vindictive-prosecution[19] is a long-recognized criminal defense. See Shuttlesworth v. Alabama, 394 U.S. 147 (1969) (conviction reversed where government singled out Black civil-rights protestors because of their race and their speech condemning government and private discrimination); United States v. Armstrong, 517 U.S. 456, 463 (1996) ("[a] selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution"); Thigpen v. Roberts, 468 U.S. 27 (1984) (reversal of conviction on heightened charges brought due to prosecutorial vindictiveness against defendant for exercising right to appeal lesser charges); Blackledge v. Perry, 417 U.S. 21 (1974) (to same effect); United States v. Meyer, 810 F.2d 1242, 258 U.S. App. D.C. 263 (D.C. Cir. 1987), *aff'd en banc sub nom.*, Bartlett v. Bowen, 824 F.2d 1240 (1987), *cert. denied sub nom.*, United States v. Meyer, 485 U.S. 940 (1988) (charges dismissed against White House protestors because prosecutor had upped the charges against the protestors because they chose to go to trial); see, also Oyler v. Boles, 368 U.S. 448, 456 (1962).

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[19] *Cf.* United States v. Wilson, 639 F.2d 500, 502 (9th Cir. 1981) ("Little substantive difference can be detected between selective prosecution and vindictive prosecution. Vindictive prosecution arises only where the government increases the severity of alleged charges in response to a defendant's exercise of constitutional rights. Selective prosecution challenges arise when a defendant alleges that he is being prosecuted initially for having exercised a constitutional right. The interests involved are the same as in vindictive prosecution cases: the defendant seeks protection from criminal prosecution initiated punitively, in response to the exercise of his constitutional rights.") (citations omitted).

Selective/vindictive prosecution is also a defense that may be raised at any time. *Cf. supra*. The Federal Rules of Criminal Procedure explicitly prescribe only three defenses that must be noticed pretrial: the defense of alibi, see FRCrP 12.1; the defense of insanity, see FRCrP 12.2; and the defense of public authority, see FRCrP 12.3. No other defense—including selective/vindictive prosecution—is listed.

Even under FRCrP 12, a selective/vindictive-prosecution defense may be raised any time. FRCrP 12(b)(2) states: "Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." FRCrP 12(b)(3) states: "Motions That Must Be Made Before Trial. The following must be raised before trial: (A) a motion alleging a defect in instituting the prosecution; (B) a motion alleging a defect in the indictment or information–but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense; (C) a motion to suppress evidence; (D) a Rule 14 motion to sever charges or defendants; and (E) a Rule 16 motion for discovery." FRCrP 12(e) states: "Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver."

The intent to pursue a selective/vindictive-prosecution defense is not expressly mentioned in FRCrP 12(b). Using the canons of statutory construction then, the intent to pursue a selective/vindictive-prosecution defense *arguably* falls under FRCrP 12(b)(2), because, as "[a] selective prosecution claim is not a defense on the merits to the criminal charge itself," United States v. Armstrong, *supra*, it is a "defense . . . that the court can determine without a trial of the

general issue." Thus, a criminal defendant *may* raise the defense before trial, but if the defendant does not, the defendant does not waive the right to raise the defense at trial.

That a selective/vindictive-prosecution defense falls under permissive FRCrP 12(b)(2) and not mandatory FRCrP 12(b)(3)—if FRCrP 12 is applicable at all—is bolstered by two things. First, the word "defense" is only mentioned in FRCrP 12(b)(2); FRCrP 12(b)(3) talks only about "motions." Selective/vindictive prosecution is a defense—not a motion. Therefore, it belongs under FRCrP 12(b)(2), *if at all*.

Second, it is well-established that to pursue a selective/vindictive-prosecution defense a criminal defendant "must first make a preliminary or threshold showing of the essential elements of the selective prosecution defense." United States v. Jacob, 781 F.2d 643, 646 (8th Cir. 1986). "[E]ven to initiate discovery to prove impermissible motives a defendant must make a colorable showing [of selective (vindictive)-prosecution]." United States v. Washington, 705 F.2d 489, 493, 227 U.S. App. D.C. 184 (D.C. Cir. 1983). "[A] mere allegation of selective prosecution . . . does not require the government to disclose the contents of its files." United States v. Catlett, 584 F.2d 864, 865 (8th Cir. 1978). "[T]he defendant must produce some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." *Ibid*. An evidentiary hearing on the issue will only be granted if the "defendant presents facts sufficient to raise a reasonable doubt about the prosecutor's motive." Jones v. White, 992 F.2d 1548, 1572 (11th Cir. 1993).

Thus, the timing of the raising of a selective/vindictive-prosecution defense is determined not by what stage the criminal case is in—pretrial versus trial—but by when the defendant diligently obtains sufficient evidence of the defense to trigger a hearing—whether that be pretrial or at trial. Thus, a rule *requiring* a criminal defendant to raise a selective/vindictive-

prosecution defense pretrial or lose forever it would make no sense, because evidence or sufficient evidence of selective/vindictive prosecution if it comes out at all may not or usually does not come out until at trial—primarily because it is within the Government's peculiar knowledge and possession and the Government self-servingly withholds it (as outrageously happened in Lt. Choi's case). Such a rule would perversely punish a criminal *defendant* because of the *Government's* wrongful obfuscation of its own wrongdoing in the first place. And it must be emphasized that simply because a defendant thinks or believes s/he has a selective/vindictive-prosecution defense, or raises it as an issue pretrial, does not mean that s/he is entitled to discovery on that defense, or that s/he has sufficient evidence to make out or to know to make out a *prima facie* case of that defense.

Additionally, a selective/vindictive-prosecution defense is a profoundly "factual" defense: who did what to whom (and/or not to whom) and why. "[D]efenses, such as self-defense, insanity, and entrapment, [that] require factual determinations that the [trier of fact] should make, render[] pretrial disposition inappropriate." United States v. Smith, 866 F.2d 1092, 1097 fn 5 (9th Cir. 1989). "In these cases, the question is not whether the defense *must* be raised prior to trial, but whether it *may* be raised prior to trial." *Ibid*. (emphasis original).

Furthermore, even if raising a selective/vindictive-prosecution defense fell under FRCrP 12(b)(3), *cf.* United States v. Jones, 52 F.3d 924 (11th Cir. 1995); United States v. Gary, 74 F.3d 304 (1st Cir. 1996)—which, importantly, the D.C. Circuit has never held and is contrary to the D.C. Circuit's own Washington case—such a defense could still be raised at trial without having previously been raised pretrial, under three established approaches. First, FRCrP 12(b)(3) itself contains no enforcement mechanism; rather, it relies on FRCrP 12(e) for a rule of waiver. But FRCrP 12(e) critically states that a "party waives any Rule 12(b)(3) defense, objection, or

request not raised *by the deadline* the *court sets* under Rule 12(c) or by an extension the court provides." (Emphasis added.) Thus, if a judge does not set a deadline—which it is in a judge's *discretion* to do or not to do to begin with, see *supra*—there simply then is no waiver if a defendant waits until trial to raise a FRCrP 12(b)(3) defense such as (arguably) selective/vindictive prosecution.

Moreover, as the Notes of Advisory Committee on Rules make clear, FRCrP 12 "leaves with the court *discretion* to determine in advance of trial defenses and objections raised by motion or to *defer* them for *determination at the trial*." Notes of Advisory Committee on Rules—1944, Note to Subdivision (b)(4) (emphasis added); see, also, Notes of Advisory Committee on Rules, House Report No. 94-247; 1975 Amendment ("Subdivision (e) as proposed to be amended permits the court to *defer* ruling on a pretrial motion until the *trial* of the general issue or until after verdict.") (emphasis added). Thus, even when a criminal defendant does raise pretrial a selective/vindictive prosecution as an issue of defense, a judge may defer resolution of it until trial.

Second, normally waiver in criminal procedure means an intentional relinquishment of a known right. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938). FRCrP 12(e) thus is only effective to begin with if a criminal defendant knew or should have known before trial (or, rather, before the FRCrP 12(e) deadline) of a particular defense, including selective/vindictive prosecution, to raise that particular defense. Obviously, if a defendant reasonably does not know s/he has a defense, s/he cannot raise it. Since, as discussed above, a selective/vindictive-prosecution defense has a heightened evidence requirement to begin with to overcome the presumption of prosecutorial regularity, knowledge of such a defense—or rather of a *prima facie* case of such a defense—may not arise for a criminal defendant until trial. Therefore, in such a

situation, there is *no* waiver, and the defense obviously may be asserted at trial. See, *e.g.*, United States v. Jones, 52 F.3d 924, 925 (11th Cir. 1995) (court allowed selective-prosecution defense to be raised as late as on appeal after the Government disclosed transcripts during trial that first revealed a basis for raising a selective-prosecution defense).

Third, on its face, FRCrP 12(e) has a *grace* provision allowing a criminal defendant to raise a selective/vindictive-prosecution defense for the first time at trial. "For good cause, the court may grant relief from the waiver." FRCrP 12(e). Whether "good cause" exists is a question which squarely "lies within the discretion of the trial court." Keegel v. Key West & Caribbean Trading Co., Inc., 627 F.2d 372, 373 (D.C. Cir. 1980). Thus, if a judge finds that there was good reason why a criminal defendant did not raise a selective/vindictive-prosecution defense pretrial—such as that the Government denied the defendant evidence of such a defense despite the defendant's diligence, or that the defendant reasonably did not know of the evidence, or that there was some unreasonable hardship to pursuing the defense at the time—the judge may allow the defendant to raise the defense later anyway. See United States v. Jones, 52 F.3d at 926 fn 2 (court *sua sponte* allowed selective-prosecution defense even though not raised pretrial because defendant's counsel could not have raised it pretrial due to his ethical conflict).

Finally, the law and jurisprudence not only do not *prohibit* a magistrate judge from allowing a diligent defendant a selective/vindictive-prosecution defense at trial or mid-trial as just demonstrated, they *require* a judge to as a constitutional matter. A criminal defendant has a Sixth Amendment constitutional right to "present a complete defense," Crane v. Kentucky, 476 U.S. 683, 690 (1986), and is entitled to a "fair opportunity to defend against the [government's] accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

Thus, under all of the authorities above, a magistrate judge has discretion—if not absolute discretion—to allow a selective/vindictive-prosecution defense to be pursued at trial or mid-trial. Thus, Judge Facciola's discretionary decision to allow Lt. Choi to pursue a selective/vindictive-prosecution defense at trial or mid-trial—after Judge Facciola had clearly deferred the issue of selective-prosecution until trial as the Government itself admits[20]—is not subject to or addressable by mandamus.

Even if Judge Facciola abused his discretion in arriving at that decision—which, as will be demonstrated momentarily, was clearly not the case—that decision still is not susceptible to mandamus in the absence, as demonstrated above, of irreparable harm to the Government. See Nat'l Ass'n of Criminal Defense Lawyers, Inc. v. United States Dep't of Justice, 182 F.3d 981, 987 (D.C. Cir. 1999); In re Cooper Tire & Rubber Co., 568 F.3d 1180 (10th Cir. 2009) ("There must be more than what we would typically consider to be an abuse of discretion in order for the writ to issue.").

The Government boldly cites three cases, U.S. v. Washington, 705 F.2d 489 (D.C. Cir. 1983), U.S. v. Jarrett, 447 F.3d 520 (7th Cir. 1996), and United v. Lopez, 854 F.Supp. 57 (D.P.R. 1994), for the proposition that once the jury has been seated or the first witness has been sworn in a criminal case, selective/vindictive prosecution may not so much as be whispered of by anyone including the judge. However, these cases stand for no such proposition. Indeed, they

[20] See "Petition" at 12 (partially quoting 8/25/11 Transcript at 7, 10-11) ("The prosecutor then noted that, pursuant to Rule 12(b)(3)(A) of the Federal Rules of Criminal Procedure, to pursue a claim of selective prosecution , the defense was required to file a pretrial motion (id. at 7). The USMJ responded, '. . . your objection will be reserved, and . . . I will consider it when I try the case' (id. at 7). Later, during the status hearing, when the government returned to the selective-prosecution issue, inquiring whether the parties would litigate it, the USMJ stated: 'I will hear, at the conclusion of the case, any legal arguments anyone wishes to make; one of which I take it will be that in prosecuting Mr. Choi but not prosecuting these demonstrators, the government is engaging in selective prosecution in violation of the Fifth Amendment' (id. at 10-11)."); see, also, 8/31/11 Tr. at 5-6.

do not even address the obviously good-cause situation where a defendant reasonably learns of selective/vindictive prosecution or of a *prima facie* case of same for the first time *at trial*. In each of the Government's cases, the respective court merely ruled that the defendant had not made out a *prima facie* case of selective prosecution on the merits, not that such a case was procedurally precluded altogether.

Thus, the Government has no clear and indisputable right to relief, and mandamus is inappropriate.

4. No Abuse of Discretion

As discussed above, under the ordinary rules of mandamus analysis, the propriety itself of Judge Facciola's discretionary decision need not even be discussed, for the Government's "petition" to be squarely rejected. The fact that it was Judge Facciola's *discretion* to make the decision in the first place is immediately dispositive against mandamus in the absence of irreparable harm. Nevertheless, out of fairness to Judge Facciola, Lt. Choi, and the principles at stake in this case, a brief[21] discussion of the propriety of Judge Facciola's decision will be undertaken without waiver of any previous argument.

It is abundantly clear that what happened in this case was a *paradigmatic* exercise of judicial discretion. While existential-democratic principles (such as freedom to criticize the Government for discrimination) were/are certainly at stake in this criminal case, the fact remains that it was/is still a federal *misdemeanor* case. Lt. Choi was charged with disobeying a lawful order of a Park Police officer, see 36 CFR § 2.32(a)(2), which carries a prison term of 6 months or less and/or a fine, see 36 CFR § 1.3(a). Given that it was/is a misdemeanor case, Judge

[21] Since this matter is not on appeal by the Government to this Court, a full explication of the evidence making out a *prima facie* case of selective/vindictive prosecution need not and will not be gone into. Again, the Government's "petition" is not an appeal and may not be treated as such.

Facciola had a legitimate interest in streamlining the progress of the case as much as possible—for judicial sake as well as that of the parties.

Thus, after when, in pretrial discussions with both the Government and the Defense, *Judge Facciola* himself could not help but notice the conspicuously unusual federal charge brought by the Government against Lt. Choi,[22] and Defense Counsel themselves raised the selective-prosecution defense as an issue, Judge Facciola obviously made the completely understandable, logical, and permissible decision to *defer* the issue of such a defense until *after* presentation of the evidence at trial—so that there would be only one evidence-hearing (the trial) instead of two (a pretrial-evidentiary-hearing and the trial). This was particularly fair and efficient given that Lt. Choi is paying out of pocket for his own defense; he resides in New York, as does three of his Defense Counsel of record; one of his Defense Counsel of record resides in Florida; his one Defense witness lives in Ohio; and the majority of the Government/Defense-hostile witnesses are in federal law-enforcement and subject to duty rotations.

Consequently, and critically, Judge Facciola did *not* set a deadline for FRCrP 12(b)(3) motions in the case—deliberately deferring the issue of selective prosecution until trial, as shown above. Again, this was eminently fair and efficient of Judge Facciola, as it allowed for the possibility of the issue being efficiently *naturally disposed of*—including in the *Government's* favor should the evidence at trial fail to adduce a *prima facie* case of selective prosecution. In fact, Judge Facciola's decision was *more than* fair to the Government. Contrary to the Government's assertion that Judge Facciola erred by not ruling at the beginning of trial on its motion in limine, see "Petition" at 4, 25, Judge Facciola had *no* duty to even entertain the Government's motion or later trial-objection to the defense at all, as it was thoroughly

[22] Again, to the point of comparing it to Shuttlesworth v. Alabama.

untimely—in fact *waived* by being so untimely. The Government filed the motion literally at the eleventh hour (approximately 11:30 p.m.) on the day before trial—a Sunday. Lead defense counsel, Robert J. Feldman, who by then was in D.C., did not even see a copy of the motion until trial when AUSA George handed it to him in the courtroom right before bringing it up with Judge Facciola. Judge Facciola himself—who presumably was not working on Sunday even if the parties were—was only able to peruse the motion early Monday morning before the 9:30 a.m. trial. See 8/29/11 a.m. Tr. at 4. Judge Facciola thus properly deferred ruling on the motion until after the evidence was presented.

Once the first witness was sworn, it was then simply a matter of the evidence naturally taking the case wherever it went. And the evidence took the case squarely and inexorably to a selective/vindictive-prosecution defense—and it did not even wait until the Defense case-in-chief to do so. The Government's own witnesses and evidence during its case-in-chief provided some of the most damning evidence against the Government of selective *and* vindictive prosecution. U.S. Park Police Lieutenant Robert LaChance, the November 15, 2010 incident commander and the officer who ordered Lt. Choi's arrest, admitted on cross-examination that before November 15, 2010—the day of Lt. Choi's protest—the Park Police and the Secret Service knew the protest was going to take place—even though Lt. Choi and his fellow protestors had not made that public. Lt. LaChance had had a discussion with his supervisors in the Park Police (including U.S. Park Police Captain Philip Beck, the Park Police watch commander on November 15, 2010) and other law-enforcement agency personnel about the planned protest. See Lt. Chance, 8/29/11 a.m. Tr. at pp. 48-53, 8/29/11 p.m. Tr. at pp. 15-17. Lt. LaChance testified that prior to November 15, 2010, he had received an email from the Secret Service about the protest. See 8/29/11 a.m. Tr. at p. 49. Lt. LaChance also testified that several hours before the protest on

November 15, 2010, he was forwarded an email from U.S. Park Police Detective Sergeant Timothy Hodge attaching a memo from Randolph J. Myers of the Solicitor's Office of the Department of Treasury (the Department for the Park Police agency). See 8/29/11 p.m. Tr. at pp. 24-26; Govt. Exs. 24/25. The memorandum, addressed to Det. Sgt. Hodge, among others, concerned how to charge Lt. Choi federally for the planned protest. See *ibid.*

U.S. Park Police Sergeant Michael Fermaint, who assisted in the arrest of Lt. Choi on November 15, 2010, testified that he too had prior knowledge of the protest. See Sgt. Michael Fermaint, 8/29/11 p.m. Tr. at p. 84. As did U.S. Park Police Officer Cameron Easter. See Off. Easter, 8/29/11 a.m. Tr. at p. 12.

Despite what Lt. LaChance just testified to, Lt. LaChance's superior on November 15, 2010, U.S. Park Police Captain Philip Beck, incredibly and tellingly could "not recall" whether prior to the protest on November 15, 2010, he had knowledge of the protest, or had talked to Lt. LaChance or Det. Sgt. Hodge about the protest. See Cpt. Beck, 8/31/11 a.m. Tr. at pp. 30-31. Cpt. Beck did know both Det. Sgt Hodge and Randolph Myers at the time though. See *ibid*; *id.* at p. 39. Cpt. Beck also testified that it was not standard to receive communications from the Secret Service regarding protests. See *ibid*. Cpt. Beck also testified that, in contrast to the federal charge for Lt. Choi's November 15, 2010 arrest, the Government had charged Lt. Choi municipally with failure to obey for his March 18, 2010 and April 20, 2010 arrests, and that those two municipal charges had been dismissed before November 15, 2010. See *id.* at pp. 15, 21, 37-38, 61-64. Cpt. Beck also testified that, before the November 15, 2010 protest, he consulted in person someone in the D.C. Attorney General's Office—who had final legal opinion on the status of the White House sidewalk as a D.C. street sidewalk—on whether the White House fence masonry-base was part of the White House sidewalk, and the particular Assistant

Attorney General opined it was not so part of the sidewalk. See *id.* at pp. 26-28. Again, incredibly, and tellingly, Cpt. Beck could not remember the name of the D.C. Assistant Attorney General he spoke with. See *ibid*.

Despite that D.C. A.G. opinion, and despite AUSA George asserting the same opinion on behalf of the U.S. Government to Judge Facciola, see *supra*, Cpt. Beck testified that "in my belief, [Lt. Choi] was on the White House sidewalk" by being on the White House fence masonry-base. See Cpt. Beck, 8/31/11 a.m. Tr. at p. 26. Cpt. Beck also testified that he believes "Gay" is slanderous. See *id.* at 40.

U.S. Park Police Officer Jerome Stoudamire, who was also present at Lt. Choi's arrest on November 15, 2010, testified that in his experience of 22 years and 2,000 arrests including in front of the White House, he "would have to say this [Lt. Choi's case] is the first time" he has seen a federal charge of failure to obey. See Off. Stoudamire, 8/29/11 p.m. Tr. at p. 135. This is consistent with Lt. LaChance's testimony that Lt. LaChance knew of only two other cases where someone affixed themselves to the White House fence—one by bike u-lock and one by leather belt—and both of those cases were charged municipally as failure to obey. See Lt. LaChance, 8/29/11 p.m. Tr. at pp. 62-66.

U.S. Park Service Ranger Amy Dailey, who helps with the issuance of permits for those who need them under the regulations (*i.e.*, groups of more than 25 people), testified that she was present during Lt. Choi's November 15, 2010 protest. See Ranger Dailey, 8/29/11 a.m. Tr. at p. 30. She had come to the area to check on the status of a group of 50 hunger strikers permitted for in *Lafayette Park*. See *id.* at 32. A woman with that group was talking about "Jesus" while Lt. Choi's DADT protest was going on. See 8/29/11 a.m. Tr. at p. 100; Govt. Ex. # 2. However, while talking, this "Jesus" lady was on Pennsylvania Avenue in line with the White House—not

in Lafayette Park—and she was using an amplified electronic-bullhorn, somewhat even drowning out Lt. Choi and his fellow protestors. See *ibid.* Even though Ranger Dailey testified that the hunger-strike group was not permitted for an amplified electronic-bullhorn, see Ranger Dailey, 8/29/11 a.m. Tr. at p. 35 lines 13-15, the Park Police neither ordered the "Jesus" lady to stop speaking or to stop using the amplifier or to move from Pennsylvania Avenue, nor arrested her, see Govt. Ex. # 2. However, the Park Police did arrest Lt. Choi and his fellow protestors—even though the regulations did not apply to them (because they were a group of less than 25 and were not on the sidewalk), see AUSA George, 8/29/11 a.m. Tr. at p. 108 lines 20-23.

Moreover, incredibly, and tellingly, Ranger Dailey testified that the only voices she recalled hearing during Lt. Choi's protest were those of Park Police officers giving the orders to Lt. Choi and his fellow protestors. See Ranger Dailey, 8/29/11 a.m. Tr. at p. 37.

All of the Government witnesses testified that Lt. Choi and his fellow protestors were peaceful and not disorderly during the November 15, 2010 protest. See Cpt. Beck, 8/31/11 a.m. Tr. at pp. 16-18, 35; Lt. LaChance, 8/29/11 p.m. Tr. at pp. 41-42, 52; Off. Stoudamire, 8/29/11 p.m. Tr. at 118. AUSA George confirmed this fact. See AUSA George, 3/18/11 Tr. at p. 23 (Lt. Choi and fellow protestors not disorderly).

Defense witness Captain James E. Pietrangelo, II—who was part of the November 15, 2010 protest but did not chain himself to the White House on that occasion[23] as did Lt. Choi and the twelve other activists arrested—testified that there was an individual in plain-cloths waiting for him, and his group of some of the 12 who later chained themselves to the White House fence with Lt. Choi, on their way to the White House for the planned protest after they emerged from a Metro stop 6 to 10 blocks from the White House. See Cpt. Pietrangelo, 8/30/11 a.m. Tr. at pp.

[23] He had done so on two prior occasions, though, with Lt. Choi.

26-27, 29. Cpt. Pietrangelo testified that the individual looked strangely at his group and seemed to recognize Cpt. Pietrangelo, and then spoke into her cuff: "There is a bunch of them coming to the White House." See *id.*

Cpt. Pietrangelo also testified that Lt. Choi was the leader of the three DADT protests in front of the White House, and that his and Lt. Choi's intent, policy, and practice in the protests was to engage in speech protesting DADT while remaining non-violent and lawful. See *id.* at pp. 18-26, 34, 51, 73-97. Cpt. Pietrangelo testified that he and Lt. Choi made everyone involved in the protests sign written pledges of non-violence, and additionally verbally emphasized that principle to them. See *id.* at pp. 21-26. Cpt. Pietrangelo testified that he and Lt. Choi chose the White House fence masonry-base to stand on during the protests because it was a lawful "loophole"—not part of the sidewalk which was subject to the regulations. See *id.* at pp. 74-83. Cpt. Pietrangelo testified that they used handcuffs as lawful props to symbolize the second-class citizenship of Gays. See *id*. at p. 88. Cpt. Pietrangelo testified that they would have ended their protest—had they not been arrested—once they decided they had finished engaging in the desired message. See *id*. at p. 53. Cpt. Pietrangelo testified that he was part of all three protests and that the first two were different from the last in that the Government charged the first two municipally, and that the first two were stoic but that the third spoke directly to President Obama. See *id*. at pp. 13, 20, 23, 35, 44, 75, 86, 88. Cpt. Pietrangelo testified that Lt. Choi was like MLK, Jr. in inspiring the third protest with his gravitas and courage after the first two arrests. See *id*. at p. 88. Cpt. Pietrangelo also testified that while in D.C. jail after being arrested by the Park Police and charged municipally for chaining himself in March and April 2010 with Lt. Choi, he, Lt. Choi, and other DADT-protest arrestees experienced harassment from the police. See *id*. at p. 23. Cpt. Pietrangelo testified that while in jail he witnessed the police

denying medical attention to an HIV+ fellow DADT-protest arrestee apparently having a heart attack. See *id*. at p. 23.

Lt. Choi himself also testified to the same peaceful and lawful intent of the protests. See Lt. Choi, 8/30/11 p.m. Tr. at pp. 57, 75, 77, 83. Indeed, he cited Jesus, Alice Paul, Ghandi, and King. See *id*. at pp. 57, 93. Lt. Choi testified that while he was in custody after his first arrest on March 18, 2010, U.S. Park Police Detective Sergeant Timothy Hodge ceremoniously ripped the insignia and American Flag off of Lt. Choi's uniform, see *id.* at pp. 64-65, and told Lt. Choi that Hodge had been in the Marines and knew what Lt. Choi and Cpt. Pietrangelo were not supposed to do, see *ibid.* Lt. Choi testified that during the April 20, 2010-protest arrest, Det. Sgt. Hodge was present and in command of the arresting Park Police officers. See *ibid.* Lt. Choi testified that during the November 15, 2010 arrest of the DADT protestors, Det. Sgt. Hodge was again present, deliberately made eye contact with Lt. Choi, and stood right in front of Lt. Choi when he was standing on the White House fence masonry-base. See *ibid.* Lt. Choi also testified that during the November 15, 2010 arrest of the DADT protestors, Det. Sgt. Hodge ceremoniously took the rank off of another Gay military veteran, Rob Smith.

During Lt. Choi's testimony at trial, a Park Police report concerning Lt. Choi's March 18, 2010 arrest was marked for identification as Defense Exhibit C. In that report, Det. Sgt. Hodge indicated that after Lt. Choi was arrested, Det. Sgt. Hodge called the Military on Lt. Choi—even though Lt. Choi—a New York National Guard soldier—was clearly not "in status" at the time of his protest/arrest and had broken no law and thus was not subject to Military jurisdiction.[24]

[24] Including as to the wearing of the uniform during the protest. 10 U.S.C. § 772 permits the wearing of the uniform during theatrical productions, and the Supreme Court has held that theatrical productions include street theater, which undeniably would include dramatic protests. See Schacht v. United States, 398 U.S. 58 (1970). In Schacht, the Supreme Court also struck down the prohibition on civilian wearing of the uniform if it brings discredit upon the Military.

Lt. Choi also testified as to how his protests were meant to build momentum like the Greensboro sit-ins, how the two previous arrests had been charged municipally and then dropped, and how the third protest was uniquely strident in speech and directed at President Obama. See Lt. Choi, 8/30/11 p.m. Tr. at pp. 49, 63, 76-77, 87, 93.

During Lt. Choi's testimony, Defense Exhibit B—a video from the Washington Blade (a Gay-issues news site)—was played. Like Government Exhibit # 2 which was also played at trial, Defense Exhibit B showed Lt. Choi's November 15, 2010 arrest, but from a different angle. Both Government Exhibit # 2 and Defense Exhibit B showed the Park Police, in arresting Lt. Choi, uniquely swarming him from among the 13 DADT-protestors arrested. Det. Sgt. Hodge can be seen violently manipulating Lt. Choi's body. At one point U.S. Park Police Officer Laska can be seen pounding Lt. Choi to the pavement, and putting his knee into below Lt. Choi's buttock. One Park Police officer can be seen sickeningly bending Lt. Choi's left arm up against the elbow joint. At another point, Det. Sgt. Hodge can be seen patting Lt. Choi's head like a dog. Lt. Choi testified as to these things as well. See Lt. Choi, 8/30/11 p.m. Tr. at pp. 83, 89-90. In particular, Lt. Choi testified that the Park Police's unnatural bending of his arm left him with post-arrest paralysis in his index finger. See *id*. at p. 60. Lt. Choi also testified that Off. Laska later bragged about throwing Lt. Choi to the ground. See *id*. at 90.

Even the Government prosecutor, AUSA Angela George, "testified" by her behavior at trial to the Government's animus and vindictiveness towards Lt. Choi and his fellow Gay activists. In an outrageous and disgusting display of that animus and vindictiveness, AUSA George at one point suggested that because Lt. Choi is Gay, he had to have derived pleasure from having male Off. Laska's knee driven into below his buttock: MS. GEORGE: So it was Officer Laska putting his body parts on your body parts, correct? LT CHOI: It seems very clear,

yes. MS. GEORGE: And you said that you had some sensations when that was going on, correct? LT. CHOI: To be honest, I think—yes. MS. GEORGE: Okay. Thank you. See *id*. at 90.

AUSA George also made a point of refusing to address Lt. Choi and Cpt. Pietrangelo by their preferred former military ranks, see *id*. at p. 70, even after the Court had instructed her to do so out of courtesy, see *id.* at p. 24.

Finally, Lt. Choi testified that after he and the 12 other November 15, 2010 DADT-protestors were federally charged, AUSA George offered them a "wired" plea deal. See *id*. at 86. As discussed *infra*, that "wired" plea deal required all of the defendants to plead guilty for any of them to do so.

Government Exhibit # 2 also showed the Park Police during the November 15, 2010-protest arrest twice unnecessarily zooming the police camera in on the face of Father Geoff Farrow, a Gay priest who was in priest frock and collar and handcuffed to the fence like Lt. Choi. The zooming-in clearly caused Father Farrow anguish.

Finally, the photographs of the Osama bin Laden-death rally of which Judge Facciola took judicial notice pretrial showed "partying" revelers plastered the *entire* length of the White House fence on Pennsylvania Avenue with their pressing, stationary bodies, and a stationary crowd fully occupying Pennsylvania Avenue, including the White House sidewalk. Revelers climbed up on the White House fence pedestal and some hung off of the fence. Others raised banners and signs in front of the fence. That's not to mention the revelers who—creating public danger and disorder—climbed up and hung off a lamp post on the White House sidewalk or climbed up and hung in at least three trees on the White House sidewalk, or the revelers who (as evidence besides the photographs would show) fast-downed beers or flashed their breasts, to name a few things. The photographs also showed a protestor with an Obama campaign sign, and

another protestor with a cardboard figure of President Obama smiling. Another judicially-noticed photo showed a Park Police officer smiling at the crowd during the rally.

Lt. LaChance testified that he was not aware of any arrests by the Park Police as a result of the Osama bin Laden-death rally. See Lt. LaChance, 8/29/11 p.m. at p. 31.

Finally, Defendant's Exhibit D at trial was a copy of U.S. Attorney General Michael Mukasey's December 19, 2007 memorandum requiring high-level White House coordination if the White House and DOJ or any sub-component discuss an ongoing criminal matter or investigation, such as vis-à-vis Lt. Choi's planned protest.

All of this evidence made out a *prima facie* case of selective *and* vindictive prosecution, and, again, the Defense was not even close to finishing presenting its case. The cumulative evidence to that point showed—as Judge Facciola ultimately stated, see The Honorable John M. Facciola, 8/31/11 p.m. Tr at pp. 5, 6, 19—that the Government charged Lt. Choi municipally the first two arrests and federally the third, and that was arbitrary, discriminatory, and retaliatory. After two *successful* protests by Lt. Choi in front of the White House criticizing President Obama and the Government for discrimination, the Government had simply become offended by Lt. Choi's increasingly-effective criticism and had decided to single him out and silence him by prosecuting him on a federal charge, whereas before it had prosecuted him on municipal charges, and whereas it municipally charged others not likewise effectively protesting anti-Gay discrimination and did not arrest much less even charge those *praising* President Obama while violating the law or regulations pertaining to the White House. See United States v. Mangieri, 694 F.2d 1270, 1273 (D.C. Cir.1982) ("To establish such a claim [of selective prosecution], [the defendant] had to prove that (1) she was singled out for prosecution from among others similarly

situated and (2) that her prosecution was improperly motivated, i.e., based on race, religion or another arbitrary classification.").

Since Judge Facciola had *not set* a deadline for pretrial motions specifically so as to defer to trial the selective-prosecution-defense issue that Lt. Choi had raised as early as March 18, 2011, Lt. Choi had not waived that defense, and was then able, having thus made out a *prima facie* case of selective/vindictive prosecution by the end of merely his opening Defense case-in-chief, to ask Judge Facciola to let him obtain immediate discovery from the Government on the issue, which Lt. Choi did in his motion to compel and orally. See 8/31/11 a.m. Tr. at pp. 3-8 (Defense Counsel Norman Kent: "But during the course of the trial and the direct testimony of certain witnesses, evidence has been elicited that suggests, in fact, the government may have a case where selective prosecution can be made by the defense."). And Judge Facciola—especially as the determiner of credibility of the witnesses and evidence—was then within his discretion to grant that discovery.

In fact, Lt. Choi had a right to request, and Judge Facciola had the discretion if not duty to grant, selective/vindictive-prosecution discovery at that point even if Lt. Choi had not raised the selective/vindictive-prosecution-defense issue pretrial and Judge Facciola had not deferred the issue to trial, on the separate grounds that certain evidence of which Lt. Choi reasonably could not have known prior to trial came out at trial and provided the basis for a *prima facie* showing. The new evidence was the Government's own admissions discussed above that it secretly knew about Lt. Choi's protest days ahead of time, indicating illegal surveillance of a peaceful and lawful Gay-civil-rights group[25]; that the Government had specifically decided to

[25] This is especially true given the military nature of the protest. The Government's own Department of Defense had previously been caught illegally spying on peaceful Gay protest groups. See Lisa Myers, "Is the Pentagon spying on Americans?", NBC News, 12/15/05,

charge Lt. Choi with a federal crime ahead of time; that at least two different Government agencies—the Park Police and the Secret Service if not the Pentagon—had participated in that decision, meaning that the White House had to be involved as a matter of United States Attorney General policy; that the Government knew before and after it arrested Lt. Choi for failing to obey an order to leave the White House sidewalk that the White House fence pedestal on which Lt. Choi was arrested is not the sidewalk; and that Cpt. Beck—one of the Park Police officers involved in Lt. Choi's arrest and the decision to charge him—is prejudiced against Gays.[26]

Prior to this evidence coming out, Lt. Choi was simply not entitled to a hearing on the selective/vindictive-prosecution defense and thus could not have asked for discovery. See Jarrett v. United States, 822 F.2d 1438 (7th Cir. 1987) ("We know of no case law nor have we been furnished with any by Jarrett holding that a defendant is automatically entitled to a hearing on a claim of selective prosecution. To obtain an evidentiary hearing on the issue of selective

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available at http://www.msnbc.msn.com/id/10454316/print/1/displaymode/1098/; "Pentagon admits errors in spying on protestors," NBC News, 3/10/06, available at http://www.msnbc.msn.com/id/11751418/ns/us_news/t/pentagon-admits-errors-spying-protesters/. It was also recently disclosed that a retired male U.S. servicemember had been posing as a lesbian on the website "Lez Get Real" and criticizing Lt. Choi for his White House protesting. See Elizabeth Flock, " 'Paula Brooks,' editor of 'Lez Get Real,' also a man," washingtonpost.com, 6/13/11, available at http://www.washingtonpost.com/blogs/blogpost/post/paula-brooks-editor-of-lez-get-real-also-a-man/2011/06/13/AGld2ZTH_blog.html; lezgetreal.com, "Is Dan Choi Helping," 4/6/10, available at http://lezgetreal.com/2010/04/is-dan-choi-helping/ ("Gay veterans are furious with Dan Choi. Dan's most recent actions, handcuffing himself to the White House fence while in his ACUs (uniform), violate several military traditions, most importantly: You don't make political statements in uniform. And you don't break the law. That alone is enough for many military folks to be outraged. On top of that, most military people share a general distaste for public protest and distrust of the media. There is a general sense that, as a Soldier, you're supposed to avoid the spotlight…after all, it's about the team, not the individual."

[26] The Government thus obviously frivolously argues in its "petition" that Lt. Choi knew before trial everything he needed to know to assert a selective (vindictive)-prosecution defense. See "Petition" at 28. Knowing that a legal defense is indicated in a case is different than knowing of specific evidence sufficient to get discovery on such a defense in a case, and Lt. Choi did not know of these admissions prior to trial and the Government does not suggest so.

prosecution, a defendant must initially overcome the legal hurdle of establishing 'a prima facie case based on facts sufficient to raise a reasonable doubt as to the prosecution's purpose.'") (citations and internal quotation marks omitted).

Further, it was only after the new evidence came out and after Lt. Choi and Cpt. Pietrangelo testified in main for the Defense that Judge Facciola himself first recognized the extent and nature or exact species of the Government's selective/vindictive prosecution. See The Honorable John M. Facciola, 8/31/11 p.m. at p. 10. While itself admitting this, the Government nonetheless faults Judge Facciola for his then-recognition and effectively argues that Judge Facciola should have been omniscient or prescient or simply smarter. See "Petition" at 27. But the Government is too presumptious of, and too disrespectful to, Judge Facciola. The stupidity was on the part of the Government, not Judge Facciola who presided over the case with exceptional grace and wisdom. As the Government refuses to understand, a judge simply has the discretion and right to *be the judge* in the case. As much as AUSA George and Det. Sgt. Hodge want to be judge, jury, and executioner of Lt. Choi, Judge Facciola is the judge in this case, and could reach a deliberate conclusion based on the evidence when he felt appropriate. He also could not just ignore what the evidence showed.

The Government nonetheless makes several (further) arguments against the propriety of Judge Facciola's decision, and these arguments are meritless if not frivolous as well. First, the Government argues that Lt. Choi waived the right to pursue a selective (vindictive)-prosecution defense at trial because "previous defense counsel asserted that 'Choi deliberately did not file any pretrial motions in this matter.'" "Petition" at 28 fn 12; see, also, at 10 ("Mr. Lynn, on behalf of Mr. Choi, responded that Mr. Choi deliberately did not file any pretrial motions in this matter' (App. D)."). But, in fact, Lt. Choi did file a pretrial motion if only orally. On August 25, 2011,

his current-lead-counsel, Robert J. Feldman, made a request on his behalf to Judge Facciola to take judicial notice of the photographs for a selective-prosecution defense. And to the degree that Lt. Choi did not make any formal motion regarding the selective (vindictive)-prosecution-defense issue—besides orally raising the issue through counsel as discussed above at the March 18, 2011 arraignment and thereafter—he did so because he was simply not required to, because, again, Judge Facciola had specifically deferred the issue to trial and not set a pretrial-motion deadline.

Next, the Government argues that legally there was not or could not have been any selective/vindictive-prosecution in AUSA George's charging Lt. Choi with a federal crime after the November 15, 2010 arrest versus the municipal traffic-violation Lt. Choi was charged with after the two previous arrests (March 18, 2010 and April 20, 2010) because AUSA George was fully "within the broad discretion afforded the prosecutor to bring any charges for which probable cause exists against a person who has three times in nine months engaged in the same illegal conduct." "Petition" at 4; see, also, at 1 ("Despite the fact that this was defendant Choi's third arrest in nine months for failing to obey a lawful order . . . ."). But none of Lt. Choi's actions during any of the three protests in front of the White House were illegal, and he did not disobey any lawful order during any of the three protests, and no court has ever found so. Lt. Choi's actions were protected speech. In fact, the Government had to at trial drop its municipal charges for the first two arrests because of this lack of any crime. See D.C. Superior Court Criminal Case Nos. 2010 CDC 004862, 2010 CDC 006977. And during the trial before Judge Facciola in the instant case, no evidence was presented that Lt. Choi's actions were illegal—in fact, quite the contrary. All of the evidence showed that Lt. Choi was peaceful and lawful.

And that is the very crux of the selective/vindictive prosecution here. The Government could not legally "get" Lt. Choi and thus stop his increasingly-effective embarrassment of President Obama and his Government, and so the Government tried to "get" him illegally, by hanging a baseless federal charge over his head in a high-stakes game of "chicken"—thinking Lt. Choi would have to crack under the pressure and stop his White House protests. And just to heighten the pressure, the Government also held Lt. Choi's fellow twelve arrestees "hostage." It charged them—most of whom had never been arrested before in D.C.—with a federal crime as well—even though normally White House protestors are charged with a municipal traffic-violation of failure to obey—and then required all thirteen arrestees—Lt. Choi and the twelve others—to agree to a "wired" plea in order for anyone of them to get that plea. Not coincidentally, this "wired" plea required all the defendants to not get arrested *at the White House* again. So that this last point is not lost, even though AUSA George eventually agreed to let the twelve defendants besides Lt. Choi have a plea deal despite Lt. Choi opting for trial, AUSA George originally said that all defendants had to accept the plea for anyone of them to.

Indeed, what happened with regard to the "wired" plea offer itself squarely demonstrates vindictive prosecution in the traditional sense in this case. Lt. Choi was punished for exercising his right to go to trial. AUSA George did not simply offer each defendant an individual plea, which would presumably have been benign enough. Nor did she offer all defendants a "wired" plea and then, when one defendant "broke" the "wire" by refusing the plea, take all the defendants to trial—which, again, would have been uniform in its treatment. Instead, AUSA George—contrary to her word—maintained the original charge only against the sole person who decided to go to trial—Lt. Choi. It was only on the eve of trial—after Lt. Choi had had the federal charge hanging over his head for nine months and had had to go to the time, effort, and

expense of assembling a defense team and readying a defense—that AUSA George offered a plea deal[27] again to Lt. Choi—but then it was only because *she* did not want to go to the effort of trial or to face Lt. Choi's defense at trial. It is damningly telling that in describing the plea offer in its "petition," see "Petition" at 1-2, 9-10, the Government never bothered to mention to the Court these highly important facts about the plea.

The Government also repeatedly mischaracterizes the nature of the selective-prosecution defense at issue in this case to begin with, in order to reach its self-serving conclusion that Lt. Choi did not make out a *prima facie* case of same at trial. The Government states that "the defendant's selective-prosecution claim . . . is not based on race, but on a claim 'that other protestors on the White House sidewalk, similarly situated, have been disparately treated.'" "Petition" at 25 fn 11. In fact, Lt. Choi's "claim" is based on "another arbitrary classification," see United States v. Mangieri, 694 F.2d 1270, 1273 (D.C. Cir.1982), *i.e.*, his protected speech if not sexual orientation. That the Osama bin Laden-death revelers, similarly situated, were treated differently by the Government than Lt. Choi, clearly goes to the selective-prosecution defense, *i.e.*, the element of being singled out, but the revelers are not the entire relevant group with respect to that element. The relevant group includes all who either attached themselves to the White House fence (what Lt. Choi did) (including Lt. Choi on previous occasions) or violated the White House sidewalk regulations (what the Government baselessly accused Lt. Choi of doing but he did not do) who were not equivalently critical of President Obama and his Government and who were not charged with a federal crime. Indeed, besides the case of Lt.

[27] The Government touts the fact that the eve-of-trial plea offer was better than that ultimately given to the twelve other defendants, but this fact is unavailing to the Government given the circumstances under which the better offer was made, as just discussed. The Government clearly gave the better offer in a desperate bid to avoid being found out in its persecution of Lt. Choi at trial which is exactly what happened.

Choi (and those with him), there have in recent history only two or three cases of people affixing themselves to the White House fence—as Lt. LaChance testified—and the Park Police charged all of them municipally with failure to obey. None of them were ostensibly Gay like Lt. Choi is, and none of them criticized President Obama like Lt. Choi did. The Park Police did not charge them federally even though, unlike Lt. Choi, they were on the sidewalk, and in the case of one, poured a gooey substance over herself that coated the fence, fence masonry-base, and the sidewalk.

The Government also unnecessarily focuses on the fact that the Osama bin Laden-death revelers did not handcuff themselves to the White House fence like Lt. Choi did. Lt. Choi's handcuffing was not illegal,[28] and Lt. Choi was not charged for handcuffing himself to the White House fence but for allegedly failing to obey an order to leave the "sidewalk" for being in violation of sidewalk regulations. The operative similarity is that the revelers did exactly what the Government baselessly accused Lt. Choi of doing—violate the sidewalk regulations—and yet, as the judicially-noticed photographs and Lt. Chance's testimony showed and further evidence would show, the Government neither ordered the revelers to leave the sidewalk nor arrested them for violating the regulations, much less did they charge them with a federal crime. Furthermore, the revelers in fact did the equivalent of handcuffing themselves to the White House fence—and worse.

As mentioned above, the photographs of which Judge Facciola took judicial notice showed revelers plastered against the entire White House fence, and on the White House fence

[28] The handcuffing did no damage to the White House fence, and the Government has not alleged nor proven any damage. There is no law expressly forbidding handcuffing to the White House fence. And, according to the Government itself, Lt. Choi was not disorderly. See 3/18/11 Tr. at 21. Lt. Choi *was* stationary on the fence masonry-base and there *is* a regulation forbidding stationary protests, but only on the sidewalk, not the masonry-base. The handcuffs were simply lawful props that symbolized the second-class citizenship of Gay Americans.

masonry-base, and hanging off of the fence, and raising banners and signs in front of the fence—all contrary to the regulations. Other revelers climbed up and hung off the lamp post and trees on the White House sidewalk—all against the law. None of them were arrested, though. There was one other important difference between Lt. Choi and the revelers: while Lt. Choi criticized and embarrassed President Obama and his Government for their discrimination against Gay people, the revelers praised President Obama and his Government for killing bin Laden. As the photographs demonstrate, one protestor had an Obama campaign sign, and another had a cardboard figure of President Obama smiling.

Even as to his twelve fellow November 15, 2010 protestors who were arrested, Lt. Choi was singled out because of his personal strident criticism of President Obama, his trademark but lawful use of his uniform in the protest, his leadership role in the DADT protests, and his ever-increasing national/international impact as a Gay-civil-rights leader. As the video shows, the Park Police officers, unlike with any of the other twelve arrestees, *swarmed* Lt. Choi when they arrested him and used excessive force on him in arresting him, to deliberately cause him pain and suffering. One of those officers handling Lt. Choi thusly was Det. Sgt. Hodge, the same Hodge who appears everywhere in this sordid tale. He clearly is obsessed with harming and punishing Lt. Choi for what Det. Sgt. Hodge believes is a holy sin under the Marine Corps bible: Gays daring to be in uniform, and Gays daring in uniform to demand the right to be in uniform.

The Government also incorrectly argues that there was no vindictive prosecution of Lt. Choi for his November 15, 2010 protest because Lt. Choi's November 15, 2010 protest was a carbon-copy of his earlier March 18, 2010 and April 20, 2010 protests, and he was charged for those two with a municipal traffic-violation not a federal crime and by the D.C. Attorney General's Office not the U.S. Attorney's Office. See "Petition" at 4 and 4 fn 3. Although all

three protests were certainly against DADT, they were in fact far from carbon-copies. The November 15, 2010 protest was strident in nature and literally spoke directly to President Obama in its criticism, see Govt. Ex. # 2 (Lt. Choi and 12 fellow protestors handcuffed to fence turning around and speaking to White House where President Obama was apparently in residence), whereas the previous two protests were stoic in nature and spoke only in the abstract of President Obama if at all. More importantly, Lt. Choi—after the first two protests and their international exposure—was at the zenith in the arc of his DADT protesting, and simultaneously President Obama was at the nadir of his DADT political posturing—having been roundly criticized by even his own political base, including his fervent Gay Democratic supporters, for not moving on DADT repeal. Critically—and most damagingly for President Obama—Lt. Choi's third protest was also showing the powerful "lunch-counter effect."

The famous lunch-counter sit-in protests by Blacks against segregation in the 1960s were so dramatic in part because they built up in momentum and inspired ever greater participation by their success. On the first day of the Greensboro sit-ins, four (4) students participated. On another day, thirty-one (31). On another day, three hundred (300). On yet another day, fourteen hundred (1,400). At the first White House DADT protest, it was just Lt. Choi, and Cpt. Pietrangelo, whom Lt. Choi had asked to join him. At the second protest, it was Lt. Choi, Cpt. Pietrangelo, and four other former servicemembers whom Lt. Choi had inspired to join him. At the third protest, it was Lt. Choi and twelve[29] others whom Lt. Choi had inspired to join him, and those twelve others included both former servicemembers *and* civilians, including a priest. Lt.

[29] While these successive numbers at first blush seem insignificant in comparison, they still represent an exponential progression, and it must be realized that a handful of citizens standing against the might of the "most powerful man in the world" on his "door step" is a task that is in many ways more daunting than remaining at a local lunch-counter—which is not to understate in any way the tremendous courage and effectiveness of the lunch-counter protestors, who certainly faced and suffered segregationist violence during the sit-ins.

Choi was building momentum and it began to strikingly show the third time. The reminiscence of Lt. Choi's tactics with the Black sit-ins increased the embarrassment of the first Black President for enforcing discriminatory DADT. That the building momentum incorporating wider and wider segments of American society—and the conspicuous sit-in association—alarmed and offended the White House and the Government is demonstrated by among others the fact that the Park Police repeatedly and for no legitimate reason zoomed the police camera in on Father Farrow's face, as if to punish him for supporting the protest.

And the fact that the D.C. Attorney General's Office prosecuted Lt. Choi's first two arrests whereas the U.S. Attorney's Office prosecuted the third tends to *prove* selective/vindictive prosecution—not dispel it.[30] In all three times, the *Park Police* made the arrest *and* determined the level of charge by filling out the arrest ticket. See 3/18/11 a.m. Tr. at p. 19; 8/29/11 p.m. Tr. at pp. 57, 93. The first two arrests, the Park Police indicated a municipal charge on the ticket. The third arrest, the Park Police indicated a federal charge, which AUSA George then pursued. Because Lt. Choi did the basic same physical[31] thing each protest—peacefully and lawfully handcuffing himself to the fence—and he had not been convicted on any charge from his previous arrests and in fact those charges had long since been dismissed—an impermissible motive on the Government's part must be inferred.

Finally, the Government argues that the actual defense which Judge Facciola decided at trial to let Lt. Choi pursue was vindictive prosecution, not selective prosecution, see "Petition" at 3, and that Judge Facciola improperly did so *sua sponte, id.* at 12. These arguments are without merit as well. Selective prosecution and vindictive prosecution are closely related, and can be

[30] Note that there is some jurisdictional overlap or control between the two, as D.C. is not a sovereign state.
[31] Although with the differences discussed above.

present together in the same case. Selective prosecution can also be termed vindictive prosecution if the arbitrary classification "selected" includes speech, *i.e.*, the different treatment from those similarly situated was based on or in retaliation for speech. Although the trial evidence—particularly the evidence showing that the orders were for Lt. Choi to leave the "sidewalk" and Lt. Choi was not on the sidewalk and yet the Government charged Lt. Choi federally for failing to obey an order anyway—clearly showed vindictive prosecution in the traditional sense, Judge Facciola simply found—after hearing the evidence—that there was a *prima facie* case that the Government had violated both Lt. Choi's Fifth and First Amendment rights. The unique "hybrid" nature of the defense—that is, both selective prosecution and vindictive prosecution—derived from the fact that the Government decided to charge Lt. Choi *before* he had even been arrested—when normally charges follow the alleged crime and following arrest. Moreover, Judge Facciola could make such a finding *sua sponte*. See United States v. Jones, *supra*. Furthermore, the Defense itself not only clearly pursued that finding on its own, including by its corresponding interrogation of witnesses along that line, see 8/29-30/11 Transcripts *passim*; 8/29/11 p.m. Tr. at pp. 32, 57-58, 69, but the Defense specifically raised that finding including in its oral motion to compel to Judge Facciola and before, see 8/31/11 a.m. Tr. at p. 72.

In sum, Judge Facciola was simply fully within his discretion in deciding to let Lt. Choi pursue a selective/vindictive-prosecution defense at trial or mid-trial, and mandamus is not appropriate.

c. The Equities Weigh Against Issuance of Mandamus

Finally, even if the Government found a "genie's bottle" and was able to "wish away" the lack of jurisdiction for and elements of mandamus, fairness and justice would compel this Court

in its discretion to still deny the Government's petition. See In re Cheney, 406 F.3d at 729 ("whether mandamus relief should issue is discretionary"). In particular, the Government has "dirty hands" in this case. See United States ex rel. Turner v. Fisher, 222 U.S. 204, 209 (1911) ("[M]andamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands."). Even putting aside the Government's obvious and outrageous persecution of Lt. Choi in this case, the Government failed to timely object to Judge Facciola's deferring the selective-prosecution issue to trial, waiting until the eleventh hour on the day before trial to file their motion in limine asking him to reverse that decision. The Government should not now be heard to complain that such deferral was erroneous.

Also, the Government obviously deliberately withheld relevant (if not exculpatory Brady material) in discovery from Lt. Choi, even though he requested it. On May 2, 2011, Lt. Choi's then-counsel, Anne Wilcox, sent a standard discovery request to AUSA George, including for Jencks material. That request asked for, among other things, "all police documents," all Jencks material, "all other documentary . . . evidence to be used at trial," and "all products or fruits of government surveillance, including . . . all other results of government surveillance of co-defendants or related activities." The Secret Service email and the Myers memo and email certainly fell within one or more of these categories, especially since the Government could only have known beforehand of Lt. Choi's November 15, 2010 protest from doing illegal surveillance on him. Yet the Government never produced pretrial any of the material in its possession regarding the pre-November 15, 2010-arrest communications that came out at trial. Moreover, the Government waited until August 27, 2011, to produce other evidence including Jencks material, four months after Lt. Choi requested it. That obviously did not allow Lt. Choi's defense

team sufficient time to review that evidence and respond to it. Mandamus is not deserved by someone (the Government) who has so fundamentally played dirty.

CONCLUSION

For all of these reasons, Lt. Choi asks this Court to dismiss and/or deny the Government's "petition."

Respectfully submitted,

_____//SIGNED//_____
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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Response to be served by electronic means, on this 20th day of September 2011, through the Court's CM/ECF system, upon AUSA Angela George, U.S. Attorney's Office for the District of Columbia, 555 4th St., NW, Rm. 4444, Washington, D.C., 20530.

_____//SIGNED//_____
ROBERT J. FELDMAN, ESQ. RF0810